THE SPIRIT OF LAWS.

Translated from the FRENCH of

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With Corrections and Additions communicated by the Author.

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DUBLIN:

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THE

THE SPIRIT OF LAWS.

BOOK XX.

Of Laws in relation to Commerce, considered in its Nature and Distinctions.

CHAP. I.
Of Commerce.

THE following subjects deserve to be treated in a more extensive manner, than the nature of this work will permit. Fain would I glide down a gentle river, but I am carried away by a torrent. Book XX. Chap. I.

Commerce is a cure for the most destructive prejudices; for it is almost a general rule, that where-ever we find agreeable manners, there commerce flourishes; and that where-ever there is commerce, there we meet with agreeable manners.

Let us not be astonished then, if our manners are now less savage than formerly. Commerce has everywhere diffused a knowledge of the manners of all nations; these are compared one with another, and from this comparison arise the greatest advantages.

BOOK XX. Chap. 2.

Commercial laws, it may be ſaid, improve manners, for the ſame reaſon as they deſtroy them. They corrupt the pureſt morals* ; this was the ſubject of Plato's complaints : and we every day ſee, that they poliſh and refine the moſt barbarous.

CHAP. II.

Of the Spirit of Commerce.

PEACE is the natural effect of trade. Two nations who traffick with each other become reciprocally dependent ; for if one has an intereſt in buying, the other has an intereſt in ſelling ; and thus their union is founded on their mutual neceſſities.

But if the ſpirit of commerce unites nations, it does not in the ſame manner unite individuals. We ſee, that in (a) countries where the people are actuated only by the ſpirit of commerce, they make a traffick of all the humane, all the moral virtues ; the moſt trifling things, thoſe which humanity would demand, are there done, or there given, only for money.

(a) Holland.

The ſpirit of trade produces in the mind of man a certain ſenſe of exact juſtice, oppoſite on the one hand to robbery, and on the other to thoſe moral virtues which forbid our always adhering rigidly to the rules of private intereſt ; and ſuffer us to neglect this for the advantage of others.

The total privation of trade, on the contrary, produces robbery, which Ariſtotle ranks in the number of means of acquiring : yet it is not at all inconſiſtent with certain moral virtues. Hoſpitality, for inſtance, is moſt rare in trading countries, while it is found in the higheſt perfection amongſt nations of vagabonds.

It

* Cæſar ſaid of the Gauls, that they were ſpoilt by the neighbourhood and the commerce of Marſeilles ; inſomuch that they who formerly always conquered the Germans, were now become inferior to them. *War of the Gauls*, Lib. vi.

It is a ſacrilege, ſays Tacitus, for a German to ſhut his door againſt any man whomſoever, whether known or unknown. He who has * behaved with hoſpitality to a ſtranger goes to ſhew him another houſe where this hoſpitality is alſo practiſed; and he is there received with the ſame humanity. But when the Germans had founded kingdoms, hoſpitality was become burthenſome. This appears by two laws of the (a) code of the Burgundians; one of which inflicted a Penalty on every barbarian, who preſumed to ſhew a ſtranger the houſe of a Roman; and the other, that whoever received a ſtranger ſhould be indemnified by the inhabitants, every one being obliged to pay his proper proportion.

Book XX. Chap. 3. & 4.

(a) Tit. 38.

CHAP. III.
Of the Poverty of the People.

THERE are two ſorts of poor; thoſe who are rendered ſuch by the ſeverity of the government; theſe are indeed incapable of performing almoſt any great action, becauſe their indigence is a conſequence of their ſlavery. Others are poor, only becauſe they either deſpiſe, or know not the conveniencies of life; and theſe are capable of accompliſhing great things, becauſe their poverty conſtitutes a part of their liberty.

CHAP. IV.
Of Commerce in different Governments.

TRADE has ſome relation to forms of government. In a monarchy it is founded on luxury, and the ſingle view with which it is carried on, is to procure every thing that can contribute to the pride, the pleaſure, and the capricious whimſies of the nation. In a republic, it is commonly founded

* Et qui modò hoſpes fuerat monſtrator hoſpitii, *De morib. Germ. Vid. Cæſar. de Bello Gal.* Lib. vi.

on oeconomy. Their merchants having an eye to all the nations of the earth, bring from one what is wanted by another. It is thus that the republics of Tyre, Carthage, Athens, Marſeilles, Florence, Venice, and Holland, engaged in commerce.

This kind of traffic has a natural relation to a republican government; to monarchies it is only occaſional. For as it is founded on the practice of gaining little, and even leſs than other nations, and of remedying this by gaining inceſſantly, it can hardly be carried on by a people ſwallowed up in luxury, who ſpend much, and ſee nothing but objects of grandeur.

Cicero was of this opinion, when he ſo juſtly ſaid*, "*that he did not like that the ſame people* "*ſhould be at once both the lords and factors of the* "*univerſe.*" For this would indeed be to ſuppoſe, that every individual in the ſtate, and the whole ſtate collectively, had their heads conſtantly filled with grand views, and at the ſame time with ſmall ones, which is a contradiction.

Not but that the moſt noble enterpriſes are compleated in thoſe ſtates, which ſubſiſt by oeconomical commerce: they have even an intrepidity, not to be found in monarchies. And the reaſon is this,

One branch of commerce leads to another, the ſmall to the moderate, the moderate to the great; while he who has gratified his deſire of gaining a little, raiſes himſelf to a ſituation, in which he is not leſs deſirous of gaining a great deal.

Beſides, the grand enterpriſes of merchants are always neceſſarily connected with the affairs of the public. But, in monarchies, theſe public affairs give as much diſtruſt to the merchants, as in free ſtates they appear to give ſafety. Great enterpriſes therefore in commerce are not for monarchical, but for republican governments.

In

* Nolo eundem populum imperatorem & portitorem eſſe terrarum.

In ſhort, an opinion of greater certainty, as to the poſſeſſion of property in theſe ſtates, makes them undertake every thing. They flatter themſelves with the hopes of receiving great advantages from the ſmiles of fortune, and therefore boldly expoſe what they have already acquired, in order to acquire more; riſking nothing but as the means of obtaining.

A GENERAL RULE. A nation in ſlavery labours more to preſerve than acquire; a free nation, more to acquire than preſerve.

CHAP. V.

Of Nations that have entered into an œconomical Commerce.

MARSEILLES, a neceſſary retreat in the midſt of a tempeſtuous ſea; Marſeilles, a harbour which all the winds, the ſhelves of the ſea, the diſpoſition of the coaſts, point out for a landing-place, became frequented by mariners; while the ſterility of the adjacent country determined the citizens to an œconomical commerce. It was neceſſary that they ſhould be laborious, to ſupply what nature had refuſed; that they ſhould be juſt, in order to live among barbarous nations, from whom they were to derive their proſperity; that they ſhould be moderate, that they might always enjoy the ſweets of a tranquil government; in fine, that they ſhould be frugal in their manners, that they might perpetually enjoy a trade the more certain, as it was leſs advantageous.

We every where ſee violence and oppreſſion give birth to a commerce founded on œconomy, while men are conſtrained to take refuge in marſhes, in iſles, in the ſhallows of the ſea, and even on rocks themſelves. Thus it was, that Tyre, Venice, and the cities of Holland, were founded. Fugitives found there a place of ſafety. It was neceſſary that

Book XX. Chap. 6. & 7.

they ſhould ſubſiſt; they drew therefore their ſubſiſtence from the whole univerſe.

CHAP. VI.

The Spirit of England, *with reſpect to Commerce.*

THE Tariff, or cuſtoms of England, are very unſettled, with reſpect to other nations; they are changed, in ſome meaſure, with every parliament, either by taking off particular duties, or by impoſing new ones. They endeavour by this means ſtill to preſerve their independence. Supremely jealous with reſpect to trade, they bind themſelves but little by treaties, and depend only on their own laws.

Other nations have made the intereſts of commerce yield to thoſe of politics; the Engliſh, on the contrary, have always made their political intereſts give way to thoſe of commerce.

They know better than any other people upon earth, how to value at the ſame time theſe three great advantages, religion, commerce, and liberty.

CHAP. VII.

In what manner the œconomical Commerce has been ſometimes reſtrained.

IN ſome kingdoms laws have been made, extremely proper to humble the ſtates that have entered into the œconomical commerce. They have forbid their importing any merchandizes, except the product of their reſpective countries; and have permitted them to traffic only in veſſels built in the kingdom where they have brought them.

It is neceſſary that the kingdom which impoſes theſe laws ſhould itſelf be able eaſily to engage in commerce; otherwiſe it will, at leaſt, be an equal ſufferer. It is much more advantageous to trade with a commercial nation, whoſe profits are moderate,

rate, and who are rendered in ſome ſort dependent by the affairs of commerce; with a nation, whoſe larger views, and whoſe extended trade enables them to diſpoſe of their ſuperfluous merchandizes; with a wealthy nation, who can take off many of their commodities, and make them a quicker return in ſpecie; with a nation under a kind of neceſſity to be faithful, pacific from principle, and that ſeeks to gain, and not to conquer: it is much better, I ſay, to trade with ſuch a nation, than with others, their conſtant rivals, who will never grant ſuch great advantages. Book XX. Chap. 8.

CHAP. VIII.

Of the Prohibition of Commerce.

A True maxim it is, that one nation ſhould never exclude another from trading with it, except for very great reaſons. The Japaneſe trade only with two nations, the Chineſe and the Dutch. The (a) Chineſe gain a thouſand *per cent.* upon ſugars, and ſometimes as much by the goods they take in exchange. The Dutch make nearly the ſame profits. Every nation that acts upon Japaneſe principles muſt neceſſarily be deceived; for it is competition which ſets a juſt value on merchandizes, and eſtabliſhes the relation between them.

(a) Du Halde, Vol. II. pag. 170.

Much leſs ought a ſtate to lay itſelf under an obligation of ſelling its manufactures only to a ſingle nation, under a pretence of their taking all at a certain price. The Poles, in this manner, diſpoſe of their corn to the city of Dantzick; and ſeveral Indian princes have made a like contract for their ſpices, with the Dutch.* Theſe arguments are proper only for a poor nation, whoſe inhabitants are ſatisfied to forego the hopes of inriching themſelves, provided they can be ſecure of a certain ſubſiſtence;

* This was firſt eſtabliſhed by the Portugueſe. *Fr. Pirard's Voyages*, Chap. xv. Part 2.

Book XX. Chap. 9.

or to nations, whoſe ſlavery conſiſts either in renouncing the uſe of thoſe things which nature has given them, or in being obliged to ſubmit to a diſadvantageous commerce.

CHAP. IX.

An Inſtitution adapted to œconomical Commerce.

IN ſtates that carry on an œconomical commerce, that have luckily eſtabliſhed banks, which, by their credit, have formed a new ſpecies of wealth; but it would be quite wrong to introduce them into governments whoſe commerce is founded only in luxury. The erecting of banks in countries governed by an abſolute monarch ſuppoſes money on the one ſide, and on the other power; that is, on the one hand the means of procuring every thing, without any power; and on the other the power, without any means of procuring at all. In a government of this kind, none but the prince ever had, or can have a treaſure; and where-ever there is one, it no ſooner becomes great, than it becomes the treaſure of the prince.

For the ſame reaſon, all aſſociations of merchants, in order to carry on a particular commerce, are improper in abſolute governments. The deſign of theſe companies is to give to the wealth of private perſons the weight of public riches. But, in thoſe governments, this weight can be found only in the prince. Nay, they are not even always proper in ſtates engaged in œconomical commerce: for, if the trade be not ſo great as to ſurpaſs the management of particular perſons, it is much better to leave it open, than, by excluſive privileges, to reſtrain the liberty of commerce.

CHAP.

CHAP. X.
The ſame Subject continued.

A Free port may be eſtabliſhed in the dominions of ſtates whoſe commerce is œconomical. That œconomy in the government, which always attends the frugality of individuals, is, if I may ſo expreſs myſelf, the ſoul of its œconomical commerce. The loſs it ſuſtains with reſpect to cuſtoms, it can repair by drawing from the wealth and induſtry of the republic. But in a monarchy, a ſtep of this kind muſt be oppoſite to reaſon; for it could have no other effect, than to eaſe luxury of the weight of taxes. This would be depriving itſelf of the only advantage that luxury can procure, and of the only curb which, in a conſtitution like this, it is capable of receiving.

Book XX. Chap. 10. & 11.

CHAP. XI.
Of the Freedom of Commerce.

THE freedom of commerce is not a power granted to the merchants to do what they pleaſe: This would be more properly its ſlavery. The conſtraint of the merchant is not the conſtraint of commerce. It is in the freeſt countries that the merchants find innumerable obſtacles; and he is never leſs croſſed by laws, than in a country of ſlaves.

England prohibits the exportation of her wool; coals muſt be brought by ſea to the capital; no horſes, except geldings, are allowed to be exported; and the * veſſels of her colonies, trading to Europe, muſt take in water in England. The Engliſh conſtrain the merchant, but it is in favour of commerce.

CHAP.

* Act of Navigation, 1660. It is only in time of war, that the merchants of Boſton and Philadelphia ſend their veſſels directly to the Mediterranean.

CHAP. XII.

What it is that deſtroys this Liberty.

Book XX. Chap. 12. & 13.

WHere-ever commerce ſubſiſts, cuſtoms are eſtabliſhed. Commerce is the exportation and importation of merchandizes, with a view to the advantage of the ſtate: cuſtoms are a certain right over this ſame exportation and importation, founded alſo on the advantage of the ſtate. From hence it becomes neceſſary, that the ſtate ſhould be neuter between its cuſtoms and its commerce, that neither of theſe two interfere with each other, and then the inhabitants enjoy a free commerce.

The farming of the cuſtoms deſtroys commerce by its injuſtice, and vexations, as well as by the exceſs of the impoſts: but, independent of this, it deſtroys it even more by the difficulties that ariſe from it, and by the formalities it exacts. In England, where the cuſtoms are managed by the king's officers, buſineſs is negotiated with a ſingular dexterity: one word of writing accompliſhes the greateſt affairs. The merchant need not loſe an infinite deal of time; he has no occaſion for a particular commiſſioner, either to obviate all the difficulties of the farmers, or to ſubmit to them.

CHAP. XIII.

The Laws of Commerce concerning the Confiſcation of Merchandizes.

THE Magna Charta of England forbids the ſeizing and confiſcating, in caſe of war, the effects of foreign merchants; except, by way of repriſals: It is very remarkable, that the Engliſh have made this one of the articles of their liberty.

In the late war between Spain and England, the former made a * law which puniſhed with death thoſe

* Publiſhed at Cadiz, in March 1740.

those who brought English merchandizes into the dominions of Spain; and the same penalty on those who carried Spanish merchandizes into England. An ordinance like this cannot, I believe, find a precedent in any laws but those of Japan. It equally shocks humanity, the spirit of commerce, and the harmony which ought to subsist in the proportion of penalties; it confounds all our ideas, making that a crime against the state which is only a violation of civil polity.

Book XX. Chap. 14.

CHAP. XIV.

Of seizing the Persons of Merchants.

SOLON (a) made a law, that the Athenians should no longer seize the body for civil debts. This law he (b) received from Egypt. It had been made by *Boccoris*, and renewed by *Sesostris*.

This law is extremely good, with respect to civil * affairs; but there is sufficient reason for its not being observed in those of commerce. For, as merchants are obliged to intrust large sums, frequently for a very short time; and to give and receive credit; it becomes necessary, that the debtor should constantly fulfil his engagements at the time prefixed; and from hence arises the necessity of laying a constraint on his person.

In affairs relating to common civil contracts, the law ought not to permit the seizure of the person; because the liberty of one citizen is of greater importance to the public, than the ease or prosperity of another. But, in conventions derived from commerce, the law ought to consider the public prosperity, as of greater importance than the liberty of a citizen; which, however, does not hinder the restrictions and limitations that humanity and good policy demand.

CHAP.

(a) Plutarch, in his Treatise *against lending upon usury.*

(b) Diodorus, B. I. Part 2. Chap. 3.

* The Greek legislators were to blame, in preventing the arms and plow of any man from being taken in pledge, and yet permitting the taking of the man himself. *Diodorus, Book* I. *Part* 2. *Chap.* 3.

CHAP. XV.
An excellent Law.

Book XX. Chap. 15. & 16.

ADmirable is that law of Geneva, which excludes from the magiſtracy, and even from admittance into the great council, the children of thoſe who have lived or died inſolvent, except they have diſcharged their father's debts. It has this effect; it gives a confidence in the merchants, in the magiſtrates, and in the city itſelf. There the credit of the individual has ſtill all the weight of public credit.

CHAP. XVI.
Of the Judges of Commerce.

XENOPHON, in his book of Revenues, would have rewards given to thoſe overſeers of commerce, who diſpatched the cauſes brought before them with the greateſt expedition. He was ſenſible of the need of our modern juriſdiction of a conſul. The Romans, in the lower empire (a), had this kind of tribunal for their mariners.

(a) Leg. 7 Cod. Theod. *de navicul.*

The affairs of commerce are but little ſuſceptible of formalities. Theſe are the actions of a day, and are every day followed by others of the ſame nature. Hence it becomes neceſſary, that every day they ſhould be decided. It is otherwiſe with thoſe actions of life which have a principal influence on futurity, but rarely happen. We ſeldom marry more than once: deeds and wills are not the work of every day: we are but once of age.

(b) On laws, Book VIII.

Plato (b) ſays, that in a city where there is no maritime commerce, there ought not to be above half the number of civil laws: this is very true. Commerce brings into the ſame country different kinds of people; it introduces alſo a great number of contracts, and of ſpecies of wealth, with various ways of acquiring it.

Thus,

Thus, in a trading city, there are fewer judges, and more laws. Book XX. Ch. 17. & 18.

CHAP. XVII.

That a Prince ought not to engage himſelf in Commerce.

THEOPHILUS (a) ſeeing a Veſſel laden with merchandizes for his wife Theodora, ordered it to be burnt. "*I am emperor*, ſaid he, *and you* "*make me the maſter of a galley: by what means* "*ſhall theſe poor men gain a livelihood, if we take* "*their trade out of their hands?*" He might have added, Who ſhall ſet bounds to us, if we monopolize all to ourſelves? who ſhall oblige us to fulfil our engagements? our courtiers will follow our example; they will be more greedy, and more unjuſt than we: the people have ſome confidence in our juſtice, they will have none in our opulence: all theſe numerous duties, which are the cauſe of their wants, are certain proofs of ours.

(a) Zonarus.

CHAP. XVIII.

The ſame ſubject continued.

WHEN the Portugueſe and Caſtilians bore ſway in the Eaſt-Indies, commerce had ſuch opulent branches, that their princes did not fail to ſeize them. This ruined their ſettlements in thoſe parts of the world.

The viceroy of Goa granted excluſive privileges to particular perſons. The people had no confidence in theſe men, and the commerce declined by the perpetual change of thoſe to whom it was intruſted; nobody took care to improve it, or to leave it entire to his ſucceſſor. In ſhort, the profit centered in a few hands, and was not ſufficiently extended.

CHAP.

CHAP. XIX.
Of Commerce in a Monarchy.

Book XX. Ch. 19. & 20.

IN a monarchical government, it is contrary to the ſpirit of commerce, that any of the nobility ſhould be merchants. *This*, ſaid the emperors (a) Honorius and Theodoſius, *would be pernicious to cities: and would remove the facility of buying and ſelling between the merchants and Plebeians.*

(a) Leg. Nobiliores, Cod. de comm. & leg. ult. de reſcind. vendit.

It is contrary to the ſpirit of monarchy, to admit the nobility into commerce. The cuſtom of ſuffering the nobility of England to trade, is one of thoſe things which has there greatly contributed to weaken the monarchial government.

CHAP. XX.
A ſingular Reflection.

PErſons ſtruck with the practice of ſome ſtates imagine, that in France they ought to make laws to engage the nobility to enter into commerce. But theſe laws would be the means of deſtroying the nobility, without being of any advantage to trade. The practice of this country is extremely wiſe; merchants are not nobles, though they may become ſo: they have the hopes of obtaining a degree of nobility, unattended with its actual inconveniencies. There is no ſurer way of being advanced above their profeſſion, than to manage it well, or with ſucceſs; the conſequence of which is generally an affluent fortune.

Laws, which oblige every one to continue in his profeſſion, and to devolve it to his children, neither are nor can be of uſe in any but * deſpotic kingdoms; where nobody either can, or ought to have emulation.

Let

* This is actually very often the caſe of ſuch governments.

Let none ſay that every one will ſucceed better in his profeſſion, when he cannot change it for another: I ſay, that a perſon will ſucceed beſt, when thoſe who have excell'd hope to ariſe to another.

The poſſibility of purchaſing honour with gold, encourages many merchants to put themſelves in circumſtances by which they may attain it. I do not take upon me to examine the juſtice of thus bartering for money the price of virtue. There are governments, where this may be very uſeful.

In France, this dignity of the long robe, a ſtation between the great nobility and the people, which, without having ſuch ſhining honours as the former, has all their privileges; a dignity, which, while this body the depoſitary of the laws is encircled with glory, leaves the private members in a mediocrity of fortune; a dignity in which there is no other means of diſtinction, but by a ſuperior capacity and virtue, but which ſtill leaves in view one much more illuſtrious: This warlike nobility likewiſe, who conceive that whatever degree of wealth they are poſſeſſed of, they may ſtill increaſe their fortunes; who are aſhamed of augmenting, if they begin not with diſſipating their eſtates; who always ſerve their prince with their whole capital ſtock; and when, that is ſunk, make room for others who follow their example; who go to war, that they may never be reproached with not having been there; who, when they can no longer hope for riches, live in expectation of honours; and when they have not obtained the latter, enjoy the conſolation of having acquired glory: All theſe things together have neceſſarily contributed to augment the grandeur of this kingdom; and, if for two or three centuries it has been inceſſantly increaſing in power, this muſt be attributed not to fortune, who was never famed for conſtancy, but to the goodneſs of its laws.

CHAP.

CHAP. XXI.

To what Nations Commerce is prejudicial.

BOOK XX. Chap. 21.

RICHES conſiſt either in lands, or moveable effects. The ſoil of every country is commonly poſſeſſed by its natives. The laws of moſt ſtates render foreigners unwilling to purchaſe their lands; and nothing but the preſence of the owner gives them any value: this kind of riches therefore belongs to every ſtate in particular. But moveable effects, as money, notes, bills of exchange, ſtocks in companies, veſſels, and in fine, all merchandiſes, belong to the whole world in general; which, in this reſpect, is compoſed of but one ſingle ſtate, of which all the ſocieties upon earth are members. The people who poſſeſs more of theſe moveable effects than any other in the univerſe, are the moſt rich. Some ſtates have an immenſe quantity, acquired by their commodities, by the labour of their mechanics, by their induſtry, by their diſcoveries; and even ſome by chance. The avarice of nations makes them quarrel for the moveables of the whole univerſe. If we could find a ſtate ſo unhappy, as to be deprived of the effects of other countries, and at the ſame time of almoſt all their own, the proprietors of the lands would there be only planters to foreigners. The ſtate, wanting all, could acquire nothing; wherefore it would be much better, for the inhabitants not to have the leaſt commerce with any nation upon earth; for commerce, in theſe circumſtances, muſt neceſſarily lead them to poverty.

A country that commonly exports fewer manufactures, or commodities, than it receives, will ſoon find the balance ſinking; it will receive leſs and leſs, until falling into extreme poverty it will receive nothing at all.

In trading countries, the ſpecie which ſuddenly vaniſhes quickly returns; becauſe thoſe nations that have

have received it, are its debtors: but it never returns into those states of which we have just been speaking, because those who have received it owe them nothing.

Poland will here serve us as an example. It has scarcely any of those things which we have called the moveable effects of the universe, except corn which is the produce of its lands. Some of their lords possess intire provinces; they oppress the husbandman, in order to have greater quantities of corn, which they send to strangers, to procure the superfluous demands of luxury. If Poland had no foreign trade, its inhabitants would be more happy. The grandees who would have only their corn, would give it to their peasants for subsistence; as their too extensive estates would become burthensome, they would therefore divide them amongst their peasants; every one would find skins or wool in their herds or flocks, so that they would no longer be at an immense expence in providing clothes: the great who are always fond of luxury, not being able to find it but in their own country, would encourage the labour of the poor. This nation, I affirm, would then become more flourishing, at least if it did not become barbarous; and this the laws might easily prevent.

Let us next consider Japan. The vast quantity of what they receive, is the cause of the vast quantity of merchandizes they send abroad. Things are thus in as nice an equilibrium, as if the importation and exportation were but small. Besides, this kind of exuberance in the state is productive of a thousand advantages: there is a greater consumption, a greater quantity of those things on which the arts are exercised; more men employed, and more ample means of acquiring power; exigences may also happen, that may require a speedy assistance, which so opulent a state can better afford than any other. It is difficult for a country to avoid having

Book XX. Chap. 21.

ſuperfluities. But it is the nature of commerce to render the ſuperfluous uſeful, and the uſeful neceſſary. The ſtate will be therefore able to afford neceſſaries to a much greater number of ſubjects.

Let us ſay then, that it is not thoſe nations who have need of nothing, that muſt loſe by trade; it is thoſe who have need of every thing. It is not ſuch people as have a ſufficiency within themſelves, but thoſe who are moſt in want, that will find an advantage in putting a ſtop to all commercial intercourſe.

BOOK XXI.

Of Laws relative to Commerce, conſidered in the Revolutions it has met with in the World.

CHAP. I.

Some general Conſiderations.

Book XXI. Chap. 1.

THO' commerce be ſubject to great revolutions, yet it is poſſible that certain phyſical cauſes, as the qualities of the ſoil, or the climate, may fix its nature for ever.

We at preſent carry on the trade of the Indies merely by means of the ſilver which we ſend thither. The (a) Romans carried annually thither about fifty thouſand ſeſterces; and this ſilver, as ours is at preſent, was exchanged for merchandizes which were brought to the weſt. All nations that ever traded to the Indies, have conſtantly carried bullion, and brought merchandizes in return.

(a) Pliny Lib. vi. cap. 23.

It is nature herſelf that produces this effect. The Indians have their arts adapted to their manner of living. Our luxury cannot be theirs; nor theirs our wants. Their climate neither demands nor permits hardly any thing which comes from ours. They go in a great meaſure naked; ſuch clothes as they have, the country itſelf furniſhes; and their religion,

religion, which is deeply rooted, gives them an aversion for those things that serve for our nourishment. They want therefore nothing but our bullion, to serve as the medium of value, and for which they give us merchandizes in return, with which the frugality of the people, and the nature of the country, furnish them in great abundance. Those ancient (b) authors who have mentioned the Indies, describe them just as we now find them, as to their policy, customs, and manners. The Indies have ever been the same Indies they are at present; and in every period of time those who traded to that country, carried specie thither, and brought none in return.

Book XXI. Chap. 2. & 3.

(b) See Pliny, Book vi. Chap. 19. and Strabo Book 15.

CHAP. II.

Of the People of Africa.

THE greatest part of the people on the coast of Africa are savages or barbarians. The principal reason, I believe, of this is, because the small countries capable of being inhabited, are separated from each other by large and almost uninhabitable tracts of land. They are without industry, or arts. They have gold in abundance, which they receive immediately from the hand of nature. Every civilized state is therefore in a condition to traffick with them to advantage; by raising their esteem for things of no value, and receiving a very high price in return.

CHAP. III.

That the Wants of the People in the South are different from those of the North.

IN Europe there is a kind of balance between the southern and northern nations. The first have every convenience of life, and few of its wants: the last have many wants, and few conveniencies. To one, nature has given much, and demands but lit-

Book XXI. Chap. 4.

tle; to the others, ſhe has given but little, and demands a great deal. The equilibrium is maintained by the lazineſs of the ſouthern nations, and by the induſtry and activity which ſhe has given to thoſe in the north. The latter are obliged to undergo exceſſive labour, without which they would want every thing, and degenerate into barbarians. This has naturalized ſlavery to the people of the ſouth: as they can eaſily diſpenſe with riches, they can more eaſily diſpenſe with liberty. But the people of the north have need of liberty, which alone can procure them the means of ſatisfying all thoſe wants which they have received from nature. The people of the north, then, are in a forced ſtate, if they are not either free or barbarians. Almoſt all the people of the ſouth are in ſome meaſure in a ſtate of violence, if they are not ſlaves.

CHAP. IV.

The principal Difference between the Commerce of the Ancients and the Moderns.

THE world has found itſelf, from time to time, in different ſituations; by which the face of commerce has been altered. The trade of Europe is at preſent carried on principally from the north to the ſouth; and the difference of climates is the cauſe that the ſeveral nations have great occaſion for the merchandizes of each other. For example, the liquors of the ſouth, which are carried to the north, form a commerce little known to the ancients. Thus the burthen of veſſels, which was formerly computed by meaſures of corn, is at preſent determined by tons of liquor.

The ancient commerce, as far as it is known to us, was carried on from one part in the Mediterranean to another; and was almoſt wholly confined to the ſouth. Now the people of the ſame climate, having nearly the ſame things of their own, have not the ſame

same need of trading amongst themselves as with those of a different climate. The commerce of Europe was therefore formerly less extended than at present. BOOK XXI. Chap. 5. & 6.

This does not at all contradict what I have said of our commerce to the Indies: for here the prodigious difference of climate destroys all relation between their wants and ours.

CHAP. V.
Other Differences.

COmmerce is sometimes destroyed by conquerors, sometimes cramped by monarchs; it traverses the earth, flies from the place where it is oppressed, and stays where it has liberty to breathe; it reigns at present where nothing was formerly to be seen but deserts, seas and rocks; and, where it once reigned, now there are only deserts.

To see Colchis in its present Situation, which is no more than a vast forest, where the people are every day decreasing, and only defend their liberty to sell themselves by piece-meal to the Turks and Persians; one could never imagine, that this country had ever, in the time of the Romans, been full of cities, where commerce convened all the nations of the world. We find no monument of these facts in the country itself; there are no traces of them, except in (a) Pliny and (b) Strabo.

(a) Lib. vi.
(b) Lib. ii.

The history of commerce, is that of the communication of people. Their numerous defeats, and the certain flux and reflux of populations and devastations, here form the most extraordinary events.

CHAP. VI.
Of the Commerce of the Ancients.

THE immense treasures of Semiramis (c), which could not be acquired in a day, give us reason

(c) Diodorus, Lib. ii.

Book XXI. Chap. 6.

to believe, that the Aſſyrians themſelves had pillaged other rich nations, as other nations afterwards pillaged them.

The effect of commerce is riches; the conſequence of riches, luxury; and that of luxury, the perfection of arts. We find that the arts were carried to great perfection in the time of Semiramis (a); which is a ſufficient indication, that a conſiderable commerce was then eſtabliſhed.

(a) Ibid.

In the empires of Aſia there was a great commerce of luxury. The hiſtory of luxury would make a fine part of that of commerce. The luxury of the Perſians was that of the Medes, as the luxury of the Medes was that of the Aſſyrians.

Great revolutions have happened in Aſia. The north-eaſt Part of Perſia, Hyrcania, Margiana, Bactria, &c. were formerly full of flouriſhing cities (b), which are now no more; and the north of this (c) empire, that is, the iſthmus which ſeparates the Caſpian and the Euxine ſeas, was covered with cities and nations, which are now deſtroyed.

(b) Pliny, Lib. vi, Chap. 16. & Strabo, Lib. ii.

(c) Strabo, Lib. ii.

Eratoſthenes (d) and Ariſtobulus learnt from Patroclus, that the merchandizes of India paſſed by the Oxus into the ſea of Pontus. Marcus Varro* tells us, that, at the time when Pompey commanded againſt Mithridates, they were informed, that they went in ſeven days from India to the country of the Bactrians, and to the river Icarus, which falls into the Oxus; that, by this means they were able to bring the merchandizes of India acroſs the Caſpian ſea, and to enter the mouth of the Cyrus; from whence it was only a five days paſſage to the Phaſis, a river that diſcharges itſelf into the Euxine ſea. There is no doubt but it was by the nations inhabiting theſe ſeveral countries, that the great empires of the Aſſyrians, Medes, and Perſians, had a communication with the moſt diſtant parts of the eaſt and weſt.

(d) Strabo, ibid.

An

* See Pliny, Lib. vi. Cap. 17. See alſo Strabo, Lib. ii. upon the paſſage by which the merchandizes were conveyed from the Phaſis to the Cyrus.

An entire ſtop is now put to this communication. All theſe countries have been laid waſte by the*Tartars, and are ſtill infeſted by this deſtructive nation. The Oxus no longer runs into the Caſpian ſea; the Tartars, for ſome private † reaſons, have changed its courſe, and it now loſes itſelf in the barren ſands.

The Jaxartes, which was formerly a barrier between the polite and barbarous nations, has had its courſe turned in the ſame manner by the Tartars, and it no longer empties itſelf into the ſea.

Seleucus-Nicator formed (a) the project of joining the Euxine to the Caſpian ſea. This project, which would have greatly facilitated the commerce of thoſe days, vaniſhed at his ‖ death. We are not certain it could have been executed in the iſthmus which ſeparates the two ſeas. This country is at preſent very little known; it is depopulated, and full of foreſts; however water is not wanting, for an infinite number of rivers roll into it from Mount Caucaſus: but as this mountain forms the north of the iſthmus, and extends like two arms (b) towards the ſouth, it would have been a grand obſtacle to ſuch an enterpriſe, eſpecially in thoſe times when they had not the art of making ſluices.

(a) Claudius Cæſar, in Plin. Lib. vi. Cap. 11.

(b) See Strabo, Lib. ii.

It may be imagined, that Seleucus would have joined the two ſeas in the very place where Peter I. has ſince joined them; that is, in that neck of land where the Tanais approaches the Volga; but the north of the Caſpian ſea was not then diſcovered.

* This is the reaſon why thoſe who have deſcribed this country, ſince it was in the poſſeſſion of the Tartars, have entirely disfigured it. The chart made of the Caſpian ſea, by order of the late Czar Peter I. has diſcovered the egregious errors of our modern ones; and by this it appears, that this ſea is conformable to the repreſentations of the ancients. See *Pliny, Lib.* vi. *Cap.* 12.

† See an account of this in Jenkinſon's *Collection of Voyages to the North.* Vol. IV.

‖ He was ſlain by Ptolemy-Ceraunus.

Book XXI. Chap. 6.

While the empires of Aſia enjoyed the commerce of luxury, the Tyrians had the commerce of œconomy, which they extended through the world. Bochard has employed the firſt book of his Canaan, in enumerating the colonies which they ſent into all the countries bordering upon the ſea: they paſſed the pillars of Hercules, and made eſtabliſhments * on the coaſts of the ocean.

In thoſe times their pilots were obliged to follow the coaſts, which were, if I may ſo expreſs myſelf, their compaſs. Voyages were long, and painful. The laborious voyage of Ulyſſes has been the fruitful ſubject of the fineſt poem in the world, next to that which alone has the preference.

The little knowledge the greateſt part of the world had of thoſe who were far diſtant from them, favoured the nations engaged in the œconomical commerce. They managed trade with as much obſcurity as they pleaſed: they had all the advantages which the moſt intelligent nations could take over the moſt ignorant.

The Egyptians, a people who by their religion and their manners were averſe to all communication with ſtrangers, had ſcarcely at that time any foreign trade. They enjoyed a fruitful ſoil, and great plenty. Their country was the Japan of thoſe times; it poſſeſſed every thing within itſelf.

So little jealous were theſe people of commerce, that they left that of the Red-ſea to all the petty nations that had any harbours in it. Here they ſuffered the Idumeans, the Aſſyrians, and the Jews to have fleets. Solomon (a) employed in this navigation the Aſſyrians, who knew theſe ſeas.

Joſephus (b) ſays, that his nation being entirely employed in agriculture, knew little of navigation: the Jews therefore traded only occaſionally in the Red-ſea. They took from the Idumeans Elath and Aſion-

(a) Chron. ix. Paralip. Lib. ii. Chap. 8.

(b) Againſt Appian.

* They founded Tarteſſus, and made a ſettlement at Cadiz.

Asiongeber, from whom they received this commerce; they lost these two cities, and with them lost this commerce. Book XXI. Chap. 6.

It was not so with the Phenicians: theirs was not a commerce of luxury; nor was their trade owing to conquest: their frugality, their abilities, their industry, their perils, and the hardships they suffered, rendered them necessary to all the nations of the world.

Before Alexander, the people bordering on the Red-sea traded only in this sea, and in that of Africa. The astonishment which filled the universe at the discovery of the Indian sea, under that conqueror, is of this a sufficient proof. I have observed (a), that bullion was always carried to the Indies, and never any brought from thence; now the Jewish fleets, which brought gold and silver by the way of the Red-sea, returned from Africa, and not from the Indies.

(a) Chap. I. of this Book.

Besides, this navigation was made on the eastern coast of Africa; for the state of navigation at that time is a convincing proof, that they did not sail to a very distant shore.

I am not ignorant, that the fleets of Solomon and Jehosaphat returned only once in three years; but I do not see that the time taken up in the voyage is any proof of the greatness of the distance.

Pliny and Strabo inform us, that the junks of India and the Red-sea were twenty days in performing a voyage, which a Grecian or Roman vessel would accomplish in (b) seven. In this proportion, a voyage of one year made by the fleets of Greece or Rome would take very near three, when performed by those of Solomon.

(b) See Pliny, Lib. vi. Cap. 22. and Strabo, Lib. xv.

Two ships of unequal swiftness do not perform their voyage in a time proportionate to their swiftness. Slowness is frequently the cause of much greater slowness. When it becomes necessary to follow the coasts, and to be incessantly in a different position,

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poſition, when they muſt wait for a fair wind to get out of a gulph, and another to proceed; a good ſailor takes advantage of every favourable moment, while the other ſtill continues in a difficult ſituation, and waits many days for another change.

This ſlowneſs of the Indian veſſels, which, in an equal time could make but the third of the way of thoſe of the Greeks and Romans, may be explained by what we every day ſee in our modern navigation. The Indian veſſels, which were built with a kind of ſea-ruſhes, drew leſs water than thoſe of Greece and Rome, which were of wood, and joined with iron.

We may compare theſe Indian veſſels to thoſe at preſent made uſe of in ports of little depth of water. Such are thoſe of Venice, and even of all * Italy in general, of the Baltic, and of the province of † Holland. Their ſhips, which ought to be able to go in and out of port, are built round and broad at the bottom; while thoſe of other nations, who have good harbours, are formed to ſink deep into the water. This mechaniſm renders theſe laſt-mentioned veſſels able to ſail much nearer to the wind; while the firſt can hardly ſail, except the wind be nearly in the poop. A ſhip that ſinks deep into the water ſails towards the ſame ſide with almoſt every wind: this proceeds from the reſiſtance which the veſſel, whilſt driven by the wind, meets with from the water, from which it receives a ſtrong ſupport; and from the length of the veſſel which preſents its ſide to the wind, while from the form of the helm the prow is turned to the point propoſed; ſo that ſhe can ſail very near to the wind, or, in other words, very near to the point from whence the wind blows. But when the hull is round and broad at the bottom, and conſequently draws little water, it no longer finds this ſteady ſupport; the wind drives the veſſel, which

* They are moſtly ſhallow; but Sicily has excellent ports.

† I ſay the province of Holland; for the ports of Zealand are deep enough.

which is incapable of reſiſtance, and can run then but with a ſmall variation from the point oppoſite to the wind. From whence it follows, that broad bottomed veſſels are longer in performing voyages. 1. They loſe much time in waiting for the wind, eſpecially if they are obliged frequently to change their courſe. 2. They ſail much ſlower, becauſe not having a proper ſupport from a depth of water, they cannot carry ſo much ſail. If this be the caſe at a time when the arts are every where known, at a time when art corrects the defects of nature, and even of art itſelf: If at this time, I ſay, we find this difference; how great muſt that have been in the navigation of the ancients?

I cannot yet leave this ſubject. The Indian veſſels were ſmall, and thoſe of the Greeks and Romans, if we except their machines built for oſtentation, much leſs than ours. Now the ſmaller the veſſel, the greater danger it encounters from foul weather. A tempeſt that would ſwallow up a ſmall veſſel, would only make a large one roll. The more one body is ſurpaſſed by another in bigneſs, the more its ſurface is relatively ſmall. From whence it follows, that in a ſmall ſhip there is a leſs proportion, that is, a greater difference as to the ſurface of the veſſel, and the weight of lading ſhe can carry, than in a large one. We know that it is a pretty general practice, to make the weight of the lading equal to that of half the water the veſſel is able to contain. Suppoſe a veſſel will contain eight hundred tons, her lading then muſt be four hundred; and that of a veſſel which would hold but four hundred tons of water, would be two hundred tons. Thus the largeneſs of the firſt ſhip will be to the weight ſhe carries, as 8 to 4; and that of the ſecond, as 4 to 2. Let us ſuppoſe then, that the ſurface of the greater is to the ſurface of the ſmaller, as 8 to 6: the ſurface of this will be to her weight as 6 to 2, while the ſurface of the former will be to her weight only as 8

to

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to 4. Therefore, as the winds and waves act only upon the ſurface, the large veſſel will by her weight reſiſt their impetuoſity much more than the ſmall.

We find from hiſtory, that before the diſcovery of the mariners compaſs, four attempts were made to ſail round the coaſt of Africa. The Phenicians ſent by * Necho, and Eudoxus (a), flying from the wrath of Ptolemy-Laturus, ſet out from the Red-ſea, and ſucceeded. Satarpes (b) ſent by Xerxes, and Hanno by the Carthaginians, ſet out from the pillars of Hercules, and failed in the attempt.

(a) Pliny Lib. ii. Cap. 67. Pomponius Mela, Lib. iii. Cap. 9.

The capital point in ſurrounding Africa was, to diſcover and double the cape of Good-hope. Thoſe who ſet out from the Red-ſea found this cape nearer by half, than it would have been in ſetting out from the Mediterranean. The ſhore from the Red-ſea is not ſo ſhallow, as that from the cape † to Hercules's pillars. The diſcovery of the cape by Hercules's pillars was owing to the invention of the compaſs, which permitted them to leave the coaſt of Africa, and to launch out ‖ into the vaſt ocean, in order to ſail towards the iſland of St. Helena, or towards the coaſt of Braſil. It was therefore very poſſible for them to ſail from the Red-ſea into the Mediterranean, but not to ſet out from the Mediterranean to return by the Red-ſea.

(b) Herodotus in Melpomene,

Thus, without making this grand circuit, after which they could hardly ever hope to return, it was moſt natural to trade to the eaſt of Africa by the Red-ſea, and to the weſtern coaſt by Hercules's pillars.

CHAP.

* He was deſirous of conquering it. *Herodotus, Lib.* iv.

† Add to this what I ſhall ſay in Chap. viii. of this Book, on the navigation of Hanno.

‖ In the months of October, November, December, and January, the wind in the Atlantic ocean is found to blow north-eaſt; our ſhips therefore either croſs the line, and to avoid the wind which is there generally at eaſt, they direct their courſe to the ſouth; or elſe they enter into the torrid zone, in thoſe places where the wind is at weſt.

CHAP. VII.

Of the commerce of the Greeks, and that of Egypt, after the conqueſt of Alexander.

THE firſt Greeks were all pirates. Minos, who enjoyed the empire of the ſea, was only more ſucceſsful, perhaps, than others in piracy; for his maritime dominion extended no farther than round his own iſle. But when the Greeks became a great people, the Athenians obtained the real dominion of the ſea; becauſe this trading and victorious nation gave laws to the moſt potent monarch (a) of that time; and humbled the maritime powers of Syria, of the iſle of Cyprus, and Phenicia. Book XXI. Chap. 7.

(a) The King of Perſia.

But this Athenian lordſhip of the ſeas deſerves to be more particularly mentioned. "*Athens*, ſays Xenophon (b), *rules the ſea; but as the country of* "*Attica is joined to the continent, it is ravaged by* "*enemies, while the Athenians are engaged in diſtant* "*expeditions. Their leaders ſuffer their lands to be* "*deſtroyed; and ſecure their wealth, by ſending it* "*to ſome iſland. The populace, who are not poſ-* "*ſeſſed of lands, have no uneaſineſs. But if the* "*Athenians inhabited an iſland, and, beſides this,* "*enjoyed the empire of the ſea, they would, as long* "*as they were poſſeſſed of theſe advantages, be able* "*to annoy others, and at the ſame time be out of all* "*danger of being annoyed.*" One would imagine that Xenophon was ſpeaking of England.

(b) On the Athenian Republic.

The Athenians, a people whoſe heads were filled with the moſt glorious projects; the Athenians, who augmented their jealouſy, inſtead of increaſing their influence, who were more attentive to extend their maritime empire than to enjoy it, whoſe political government was ſuch that the common people diſtributed the public revenues amongſt themſelves, while the rich were in a ſtate of oppreſſion; the Athenians, I ſay, did not carry on ſo extenſive a commerce

Book XXI. Chap. 7.

commerce as might be expected from the produce of their mines, from the multitude of their ſlaves, from the number of their ſeamen, from their influence over the cities of Greece, and, above all, from the excellent inſtitution of Solon. Their trade was almoſt wholly confined to Greece, and to the Euxine ſea; from whence they drew their ſubſiſtence.

Corinth ſeparated two ſeas, and opened and ſhut the Peloponneſus: it was the key of Greece, and a city, in fine, of the greateſt importance, at a time when the people of Greece were a world, and the cities of Greece, nations. Its trade was very extenſive, having a port to receive the merchandizes of Aſia; and another, thoſe of Italy: for the great difficulties which attended the doubling Cape Malea, where the (*) meeting of oppoſite winds cauſes ſhipwrecks, induced every one to go to Corinth, and they could even convey their veſſels over land from one ſea to the other. Never was there a city, in which the works of art were carried to ſo high a degree of perfection. But here religion finiſhed the corruption, which their opulence began. They erected a temple to Venus, in which more than a thouſand courteſans were conſecrated to that deity; from this ſeminary came the greateſt part of thoſe celebrated beauties, whoſe hiſtory Athenæus has preſumed to commit to writing.

(*) See Strabo, Lib. viii.

Four great Events happened in the reign of Alexander, which entirely changed the face of commerce; the taking of Tyre, the conqueſt of Egypt, that likewiſe of the Indies, and the diſcovery of the ſea that lies ſouth of thoſe countries The Greeks of Egypt found themſelves in an excellent ſituation for carrying on a prodigious commerce; they were maſters of the ports of the Red-ſea; Tyre, the rival of all the trading nations, was no more; they were not conſtrained by the ancient * ſuperſtition of the

* Which inſpired an averſion for ſtrangers.

the country; Egypt was become the centre of the univerſe.

The empire of Perſia extended to the Indus (a). Darius, long before Alexander, had ſent (b) ſome veſſels which ſailed down this river, and paſſed even into the Red-ſea. How then were the Greeks the firſt who traded to the Indies by the South? Had not the Perſians done this before? Did they make no advantage of ſeas which were ſo near them; of the very ſeas that waſhed their coaſts? Alexander, it is true, conquered the Indies; but was it neceſſary for him to conquer a country, in order to trade with it? This is what I ſhall now examine.

(a) Strabo, Lib. xv.

(b) Herodotus in Melpomene.

Ariana (c), which extended from the Perſian Gulf as far as the Indus, and from the South ſea to the mountains of Paropamiſus, depended indeed in ſome meaſure on the empire of Perſia: But in the ſouthern part it was barren, ſcorched, rude, and uncultivated. Tradition (d) relates, that the armies of Semiramis and Cyrus periſhed in theſe deſarts; and Alexander, who cauſed his fleet to follow him, could not avoid loſing in this place a great part of his army. The Perſians left the whole coaſt to the Icthyophagi (e), the Oritæ, and other barbarous nations. Beſides, the Perſians were no * great ſailors, and their very religion debarred them from entertaining any ſuch notion as that of a maritime commerce. The voyage undertaken by Darius's direction upon the Indus, and the Indian ſea, proceeded rather from the capriciouſneſs of a prince vainly ambitious of ſhewing his power, than from any ſettled regular project. It was attended with no conſequence, either to the advantage of commerce, or of navigation. They emerged from their ignorance, only to plunge into it again.

(c) Strabo, Lib. xv.

(d) Strabo, Lib. xv.

(e) Pliny, Lib. vi. Cap. 23. Strabo, Lib. xv.

Beſides,

* They ſailed not upon the rivers, leſt they ſhould defile the elements. *Hyde's Religion of the Perſians.* Even to this day they have no maritime commerce. Thoſe who take to the ſea, are treated by them as atheiſts.

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Beſides, it was a received opinion (a) before the expedition of Alexander, that the ſouthern parts of India were uninhabitable.* This proceeded from a tradition that (b) Semiramis had brought back from thence only twenty men, and Cyrus but ſeven.

(a) Strabo, Lib. xv.

(b) Ibid.

Alexander entered by the north. His deſign was to march towards the eaſt: but having found a part of the ſouth full of great nations, cities, and rivers; he attempted to conquer it, and ſucceeded.

He then formed the deſign of uniting the Indies to the weſtern nations by a maritime commerce, as he had already united them by the colonies he had eſtabliſhed by land.

He ordered a fleet to be built on the Hydaſpes, and then fell down that river, entered the Indus, and ſailed even to its mouth. The fleet followed the coaſt from the Indus along the banks of the country of the Oritæ, and the Ichthyophagi, of Carmania and Perſia. He built cities, and would not ſuffer the Ichthyophagi (c) to live on fiſh, deing deſirous of having the borders of this ſea inhabited by civilized nations. Oneſecritus and Nearchus, took (d) a journal of this voyage, which was performed in ten months. They arrived at Suſa, where they found Alexander, who gave an entertainment to his whole army. He had left the fleet at Patala†, to go thither by land.

(c) Pliny, Book vi. Chap. 20.

(d) Ibid.

This conqueror had founded Alexandria, with a view of ſecuring his conqueſt of Egypt; this was a key to open it in the very place where the kings his ‖ predeceſſors had a key to ſhut it; and he had not the

* Herodotus (in Melpomene) ſays, that Darius conquered the Indies; this muſt be underſtood only to mean Ariana; and even this was only an ideal conqueſt.

† A city in the iſland of Patalena, at the mouth of the Indus.

‖ Alexandria was founded on a flat ſhore, called Racotis, where the former kings had kept a garriſon to prevent all ſtrangers, and more particularly the Greeks, from entering the country. *Pliny, Lib. v. Cap. 10. Strabo, Lib. xvii.*

the leaſt thought of a commerce, of which the diſcovery of the Indian ſea could alone give him the idea. Book XXI. Chap. 7.

The kings of Syria left the commerce of the ſouth to thoſe of Egypt, and attached themſelves only to the northern trade, which was carried on by means of the Oxus and the Caſpian ſea. They then imagined that this ſea was a part of the (a) northern ocean. Seleucus and Antiochus applied themſelves to make diſcoveries in it, with a particular attention; and with this view they ſcoured it with their fleets (b). That part which Seleucus ſurveyed, was called the Seleucidian ſea; that which Antiochus diſcovered, received the name of the ſea of Antiochus. Attentive to the projects they might have formed, of attacking Europe from hence on the back of Gaul and Germany, they neglected the ſeas on the South; whether it was that the Ptolemys, by means of their fleets on the Red-ſea, were already become the maſters of it; or that they had diſcovered ſuch an invincible averſion in the Perſians againſt engaging in maritime affairs; or, in fine, that the general ſubmiſſion of all the people in the ſouth, left no room for them to flatter themſelves with the hopes of further conqueſts.

(a) Pliny, Lib. vi. Cap. 12. & Strabo, Lib. ii. Pag. 507.

(b) Pliny, Lib. ii. Cap. 67.

I am ſurprized, I confeſs, at the obſtinacy with which the ancients believed that the Caſpian ſea was a part of the ocean. The expeditions of Alexander, of the kings of Syria, of the Parthians and the Romans, could not make them change their ſentiments; notwithſtanding theſe nations deſcribed the Caſpian ſea with a wonderful exactneſs: but men are generally ſo tenacious of their errors, that they acquieſce to truth as late as poſſible. When only the ſouth of this ſea was known, it was at firſt taken for the ocean; in proportion as they advanced along the banks of the northern coaſt, inſtead of imagining it a great lake, they ſtill believed it to be the ocean, that here made a ſort of a bay; when they had almoſt finiſhed its circuit, and had quite ſurveyed the northern coaſt, though their eyes were then open-

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ed, yet they ſhut them once more; and took the mouth of the Volga for a ſtrait, or a prolongation of the ocean.

The land army of Alexander had been only on the eaſt as far as the Hypanis, which is the laſt of thoſe rivers that fall into the Indus: thus the firſt trade which the Greeks carried on to the Indies was confined to a very ſmall part of the country. Seleucus Nicator penetrated as far as the Ganges (a), and by that means diſcovered the ſea into which this river falls, that is to ſay, the bay of Bengal. The moderns diſcover countries by voyages at ſea; the ancients diſcovered ſeas by conqueſts at land.

(a) Pliny, Lib. vi. Cap. 17.

(b) Lib. xv. Strabo (b), notwithſtanding the teſtimony of Apollodorus, ſeems to doubt whether the Grecian (c) kings of Bactria proceeded farther than Seleucus and Alexander. I am apt to think they went no further to the eaſt, and that they did not paſs the Ganges: but they went farther towards the ſouth: they diſcovered * Siger, and the ports in Guzarat and Malabar, which gave riſe to the navigation I am going to mention.

(c) Apollonius Adrumatinus in *Strabo*, Lib. ii.

(d) Lib. vi. Cap. 23. Pliny (d) informs us, that the navigation of the Indies was ſucceſſively carried on by three different ways. At firſt, they ſailed from the cape of Siagre to the iſland of Patalena, which is at the mouth of the Indus. This we find was the courſe that Alexander's fleet ſteered to the Indies. They took afterwards (e) a ſhorter and more certain courſe, by ſailing from the ſame cape or promontory to Siger: this can be no other but the kingdom of Siger, mentioned by Strabo (f), and diſcovered by the Grecian kings of Bactria. Pliny, by ſaying that this way was ſhorter than the other, can mean only that the voyage was made in leſs time: for as Siger was diſcovered by the kings of Bactria, it muſt have been farther than the Indus: by this paſſage they muſt therefore

(e) Pliny, Lib. vi. Cap. 23.

(f) Lib. xi. Sigertidis regnum.

* The Macedonians of Bactri, India, and Ariana, having ſeparated themſelves from Syria, formed a great ſtate.

therefore have avoided the winding of certain coaſts, and taken advantage of particular winds. The merchants at laſt took a third way; they ſailed to Canes, or Ocelis, ports ſituated at the entrance of the Red-ſea; from whence, by a weſt wind, they arrived at Muziris, the firſt ſtaple town of the Indies, and from thence to the other ports.

Here we ſee, that inſtead of ſailing to the mouth of the Red-ſea as far as Siagre by coaſting Arabia-Felix to the north-eaſt, they ſteered directly from weſt to eaſt, from one ſide to the other, by means of the trade-winds, whoſe regular courſe they diſcovered by ſailing in theſe latitudes. The ancients never loſt ſight of the coaſts, but when they took advantage of theſe winds, which were to them a kind of compaſs.

Pliny (a) ſays, that they ſet ſail for the Indies in the middle of ſummer, and returned towards the end of December, or in the beginning of January. This is intirely conformable to our naval journals. In that part of the Indian ſea which is between the peninſula of Africa, and that on the other ſide the Ganges, there are two monſoons; the firſt, during which the winds blow from weſt to eaſt, begins in the month of Auguſt or September; and the ſecond, during which the wind is in the eaſt, begins in January. Thus we ſet ſail from Africa or Malabar, at the ſeaſon of the year that Ptolemy's fleet uſed to ſet out from thence; and we return too at the ſame time as they.

(a) Lib. vi. Cap. 23.

Alexander's fleet was ſeven months in ſailing from Patala to Suſa. It ſet ſail in the month of July, that is, at a ſeaſon when no ſhip dare now put to ſea to return from the Indies. Between theſe two monſoons there is an interval of time, during which the winds vary; when a north-wind, meeting with the common winds, raiſes, eſpecially near the coaſts, the moſt terrible tempeſts. Theſe continue during the months of June, July, and Auguſt. Alexander's

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fleet, therefore, ſetting ſail from Patala in the month of July, muſt have been expoſed to many ſtorms, and the voyage muſt have been long, becauſe they ſailed againſt the trade-wind.

Pliny ſays, that they ſet out for the Indies at the end of ſummer; thus they ſpent the time which ought to have been employed in taking advantage of the trade-wind, in their paſſage from Alexandria to the Red-ſea.

Obſerve here, I pray, how navigation has by little and little arrived at perfection. Darius's fleet was two years and a half (a) in falling down the Indus, and going to the Red-ſea. Afterwards the fleet of Alexander (b), deſcending the Indus, arrived at Suſa in ten months, having ſailed three months on the Indus, and ſeven on the Indian ſea: at laſt, the paſſage from the coaſt of Malabar to the Red-ſea was made in forty days (c).

(a) Herodotus in Melpomene.

(b) Pliny, Lib. vi. Cap. 23.

(c) Ibid.

(d) Lib. xv.

Strabo (d), who accounts for their ignorance of the countries between the Hypanis and the Ganges, ſays, that there were very few of thoſe who ſailed from Egypt to the Indies, that ever proceeded ſo far as the Ganges. Their fleets, in fact, never went thither: they ſailed with the weſtern trade-winds from the mouth of the Red-ſea to the coaſt of Malabar. They caſt anchor in the ports along that coaſt, and never attempted to go round the peninſula on this ſide the Ganges by Cape Comorin and the coaſt of Coromandel. The plan of navigation laid down by the kings of Egypt and the Romans was, to ſet out and return the ſame year (e).

(e) Pliny, Lib. vi. Cap. 23.

Thus it is demonſtrable, that the commerce of the Greeks and Romans to the Indies was much leſs extenſive than ours. We know immenſe countries, which to them were entirely unknown; we traffic with all the Indian nations; we even manage their trade, and in our bottoms carry on their commerce.

But this commerce of the ancients was carried on with far greater facility than ours. And if the moderns

derns were to trade only to the coaſt of Guzarat and Malabar, and, without ſeeking for the ſourthern iſles, were ſatisfied with what theſe iſlanders brought them, they would certainly prefer the way of Egypt to that of the cape of Good-hope. (a) Strabo informs us, that they traded thus with the people of Taprobane.

(a) Lib. xv.

I ſhall finiſh this chapter with a reflection. Ptolemy the (b) geographer extends the eaſtern part of known Africa to Cape Praſum, and Arrian (c) bounds it by Cape Raptum. Our beſt maps place Cape Praſum at Moſambique, in 14 degrees and a half ſouth latitude, and Cape Raptum, at about 10 degrees of the ſame latitude. But as the country extending from the kingdom of Ajan (a kingdom that indeed produces no merchandize,) becomes richer in proportion as it ſtretches towards the ſouth, as far as the country of Sofata, where lies the ſource of riches; it appears at firſt view aſtoniſhing, that they ſhould have thus retrograded towards the north, inſtead of advancing to the ſouth.

(b) Lib. iv. Cap. vii. & Lib. viii.

(c) See the Periple of the Erythrean ſea.

In proportion as their knowledge increaſed, navigation and trade deſerted the coaſt of Africa for that of India. A rich and eaſy commerce made them neglect one leſs lucrative, and more full of difficulties. The eaſtern coaſt of Africa was leſs known, than in the time of Solomon; and though Ptolemy ſpeaks of Cape Praſum, it is rather as of a place that had been formerly known, than of one known at that time. Arrian * bounds the known country at Cape Raptum, becauſe at that time they went no further. And though † Marcian of Heraclea extends it to Cape Praſum, his authority is of no weight: for he himſelf confeſſes ‖, that he copies from Artemidorus, and Artemidorus from Ptolemy.

* Ptolemy and Arrian were nearly contemporaries.

† His work is to be found in a collection of the ſmall pieces of the Grecian geographers, printed at Oxford in 1698, Vol. I. pag. 10.

‖ Ibid. p. 1, 2.

CHAP. VIII.
Of Carthage, *and* Marſeilles.

Book XXI. Chap. 8.

CARTHAGE increaſed her power by her riches, and afterwards her riches by her power. Being miſtreſs of the coaſts of Africa, which are waſhed by the Mediterranean, ſhe extended herſelf along the ocean. Hanno, by order of the ſenate of Carthage, diſtributed thirty thouſand Carthaginians from Hercules's Pillars as far as Cerne. This place, he ſays, is as far from Hercules's Pillars, as the latter from Carthage. This ſituation is extremely remarkable. It ſhews us, that Hanno limited his ſettlements to the 25th degree of north latitude, that is, to two or three degrees ſouth of the Canaries.

Hanno being at Cerne undertook another voyage, with a view of making further diſcoveries towards the ſouth. He took but little notice of the continent. He followed the coaſt for twenty-ſix days, when he was obliged to return for want of proviſions. The Carthaginians, it ſeems made no uſe of this ſecond enterprize. Scylax (a) ſays, that the ſea is not (b) navigable beyond Cerne, becauſe it is ſhallow, full of mud and ſea-weeds: and, in fact, there are many of theſe in thoſe * latitudes. The Carthaginian merchants mentioned by Scylax might find obſtacles, which Hanno, who had ſixty veſſels of fifty oars each, had ſurmounted. Difficulties are almoſt but relative; beſides, we ought not to confound an enterprize, in which bravery and reſolution muſt be exerted, with things that require no extraordinary conduct.

(a) See his *Periplus*, under the article of Carthage.

(b) See Herodotus in Melpomene, on the obſtacles which Sataſpe encountered.

The relation of Hanno's voyage is a fine fragment of antiquity. It was written by the very man that performed

* See the charts and narrations in the firſt volume of *Voyages that contributed to the eſtabliſhment of an Eaſt India company*, part I. p. 201. This weed covers the ſurface of the ſea in ſuch a manner that it can ſcarcely be perceived, and veſſels can only paſs through it with a ſtiff gale.

performed it. His recital is not mingled with oſtentation. Great Commanders write their actions with ſimplicity; becauſe they receive more glory from facts than from words. The ſtile is agreeable to the ſubject: He deals not in the marvellous. All he ſays of the climate, of the ſoil, the behaviour, the manners of the inhabitants, correſpond with what is every day ſeen on this coaſt of Africa; one would imagine it the journal of a modern ſailor.

He obſerved from his fleet, that in the day time there was a prodigious ſilence on the continent, that in the night he heard the ſound of various muſical inſtruments, and that fires were then to be ſeen every where, ſome larger than others. Our relations are conformable to this; it has been diſcovered, that in the day the ſavages retire into the foreſts to avoid the heat of the ſun, that they light up great fires in the night to diſperſe the beaſts of prey, and that they are paſſionately fond of muſic and dancing.

The ſame writer deſcribes a volcano with all the phenomena of Veſuvius; and relates, that he took two hairy women, who choſe to die rather than follow the Carthaginians, and whoſe ſkins he carried to Carthage. This has been found not void of probability.

This narration is ſo much the more valuable as it is a monument of Punic antiquity; and from hence alone it has been regarded as fabulous. For the Romans retained their hatred to the Carthaginians, even after they had deſtroyed them. But it was victory alone that decided whether we ought to ſay *the Punic*, or *the Roman faith*.

The moderns* have imbibed theſe prejudices. What is become, ſay they, of the cities deſcribed by Hanno, of which even in Pliny's time there remained not the leaſt traces? Wonderful would it have been indeed had they continued. Was it a Corinth or Athens that Hanno built on theſe coaſts? He left Carthaginian

* Mr. Dodwell. See his *Diſſertation on the Periplus of* Hanno.

Book XXI. Chap. 8.

ginian families in ſuch places as were moſt commodious for trade, and ſecured them as well as his hurry could permit againſt ſavages and wild beaſts. The calamities of the Carthaginians put a period to the Navigation of Africa; theſe families muſt neceſſarily then either periſh or become ſavages. Beſides, were the ruins of theſe cities even ſtill in being, who is it that would venture into the woods and marſhes to make the diſcovery? We find however, in Scylax and Polybius, that the Carthaginians had conſiderable ſettlements on theſe coaſts. Theſe are the remains of the cities of Hanno; there are no other, for the ſame reaſon that there are no other of Carthage itſelf.

The Carthaginians were in the high road to wealth; and had they gone ſo far as four degrees of north latitude, and fifteen of longitude, they would have diſcovered the gold coaſt. They would then have had a trade of much greater importance than that which is carried on there at preſent, at a time when America ſeems to have degraded the riches of all other countries. They would there have found treaſures of which they could never have been deprived by the Romans.

Very ſurprizing things have been ſaid of the riches of Spain. If we may believe Ariſtotle (a), the Phenicians who arrived at Tarteſſus, found ſo much ſilver there, that their ſhips could not hold it all; and they made of this metal their meaneſt utenſils. The Carthaginians, according to Diodorus (b), found ſo much gold and ſilver in the Pyrenean mountains, that they adorned the anchors of their ſhips with it. But no foundation can be built on ſuch popular reports. Let us therefore examine into the facts themſelves.

(a) Of wonderful things.

(b) Lib. vi.

We find in a fragment of Polybius cited by Strabo (c), that the ſilver mines at the ſource of the river Bætis, in which forty thouſand men were employed, produced to the Romans twenty-five thouſand drachmas a day, that is, about five millions of livres

(c) Lib. iii.

livres a year, at fifty livres to the mark. The mountains that contained theſe mines were called the (a) *Silver Mountains:* which ſhews they were the Potoſi of thoſe times. At preſent the mines of Hanover do not employ a fourth part of the workmen, and yet they yield more. But as the Romans had not many copper-mines, and but few of ſilver; and as the Greeks knew none but the Attic mines, which were of little value, they might well be aſtoniſhed at their abundance.

(a) *Mons Argentarius.*

In the war that broke out for the ſucceſſion of Spain, a man called the marquis of Rhodes, of whom it was ſaid he was ruined in golden mines, and inriched in hoſpitals *, propoſed to the court of France to open the Pyrenean mines. He alledged the example of the Tyrians, the Carthaginians, and the Romans. He was permitted to ſearch, but ſought in vain; he ſtill alledged, and found nothing.

The Carthaginians being maſters of the gold and ſilver trade, were willing to be ſo of the lead and pewter. Theſe metals were carried by land from the ports of Gaul upon the ocean to thoſe of the Mediterranean. The Carthaginians were deſirous of receiving them at the firſt hand; they ſent Himilco † to make (b) a ſettlement in the iſles called Caſſiterides, which are imagined to be thoſe of Scilly.

(b) See Feſtus Avienus.

Theſe voyages from Bætica into England have made ſome perſons imagine, that the Carthaginians knew the compaſs: but it is very certain, that they followed the coaſts. There needs no other proof than Himilco's being four months in ſailing from the mouth of the Bætis to England: beſides the famous piece of hiſtory of this Carthaginian (c) pilot, who

(c) Strabo, Lib. iii. towards the end.

* He had ſome ſhare in their management.

† It appears from Pliny, that this Himilco was ſent at the ſame time with Hanno; and as in the time of Agathocles there were a Hanno and an Himilco, both chiefs of the Carthaginians, Mr. Dodwel conjectures that theſe were the ſame; more eſpecially, as the republic was then in its flouriſhing ſtate. See his *Diſſertation on the Periplus of* Hanno.

Book XXI. Chap. 8.

who being followed by a Roman veſſel, ran a-ground that he might not * ſhew her the way to England, plainly intimates that theſe veſſels were very near the ſhore, when they fell in with each other.

The ancients might have performed voyages, that would make one imagine they had the compaſs, though they had not. If a pilot was far from land, and during his voyage had ſuch ſerene weather, that in the night he could always ſee a polar ſtar, and in the day the riſing and ſetting of the ſun, it is certain he might regulate his courſe as well as we do now by the compaſs: but this muſt be a fortuitous caſe, and not a regular method of navigation.

We ſee in the treaty which put an end to the firſt Punic war, that Carthage was principally attentive to preſerve the empire of the ſea, and Rome that of the land. Hanno (a), in his negociation with the Romans, declared that they ſhould not be ſuffered even to waſh their hands in the ſea of Sicily; they were not permitted to ſail beyond the *promontorium pulchrum*; they were forbid to trade in Sicily †, Sardinia, and Africa, except at Carthage: an exception that ſhews us there was no deſign to favour them in their trade with that city.

(a) Frenſhemius's Supplement to Livy, 2d Decad. Lib. vi.

In early times there had been very great wars between Carthage and Marſeilles § on the ſubject of fiſhing. After the peace they entered jointly into the œconomical commerce. Marſeilles at length grew jealous, eſpecially as being equal to her rival in induſtry, ſhe was become inferior to her in power. This is the motive of her great fidelity to the Romans. The war between the latter and the Carthaginians in Spain was a ſource of riches to Marſeilles, which was now become their magazine. The ruin of

* He was rewarded by the ſenate of Carthage.

† In the parts ſubject to the Carthaginians.

§ *Carthaginienſium quoque exercitus cùm bellum captis piſcatorum navibus ortum eſſet, ſæpe fuderunt, pacemque victis dederunt.* Juſtin, lib. xliii. cap. 5.

of Carthage and Corinth ſtill increaſed the glory of Marſeilles, and had it not been for the civil wars, in which this republic ought on no account to have engaged, ſhe would have been happy under the protection of the Romans, who had not the leaſt jealouſy of her commerce. Book XXI. Chap. 9. & 10.

CHAP. IX.

Of the genius of the Romans *as to maritime affairs.*

THE Romans laid no ſtreſs on any thing but their land forces, who were diſciplined to ſtand always firm, to fight on one ſpot, and there bravely to die. They could not like the practice of ſeamen, who firſt offer to fight, then flie, then return, conſtantly avoid danger, often make uſe of ſtratagems, and ſeldom of force. This was not ſuitable to the genius of the * Greeks, much leſs to that of the Romans.

They deſtined therefore to the ſea only thoſe citizens who were not (a) conſiderable enough to have a place in their legions. Their marines were commonly freed-men.

(a) Polybius, Lib. v.

At this time we have neither the ſame eſteem for land-forces, nor the ſame contempt for thoſe of the ſea. In the firſt, (b) art is decreaſed; in the (c) ſecond, it is augmented: now, things are generally eſteemed in proportion to the degree of ability requiſite to diſcharge them.

(b) See the Conſiderations on the cauſes of the riſe and declenſion of the Roman grandeur.

(c) Ibid.

CHAP. X.

Of the genius of the Romans *with reſpect to commerce.*

THE Romans were never diſtinguiſhed by a jealouſy of trade. They attacked Carthage as a rival, not as a trading nation. They favoured trading

* As Plato has obſerved, lib. iv. of Laws.

Book XXI. Chap. 10.

trading cities that were not ſubject to them. Thus they increaſed the power of Marſeilles by the ceſſion of a large territory. They were vaſtly afraid of barbarians; but had not the leaſt apprehenſion from a trading people. Their genius, their glory, their military education, and the very form of their government, eſtranged them from commerce.

In the city they were employed only about war, elections, factions, and law-ſuits; in the country, about agriculture; and, as for the provinces, a ſevere and tyrannical government, which there prevailed, was incompatible with commerce.

But their political conſtitution was not more oppoſite to trade, than their law of nations. "*The people*, ſays (a) Pomponius the civilian, *with whom we have neither friendſhip nor hoſpitality, nor alliance are not our enemies; however, if any thing belonging to us falls into their hands, they are the proprietors of it: freemen become their ſlaves, and they are upon the ſame terms with reſpect to us.*"

(a) Leg. v. ff. de Captivis.

Their civil law was not leſs oppreſſive. The law of Conſtantine, after having ſtigmatized as baſtards the children of perſons of a mean rank, that had been married to thoſe of a ſuperior ſtation, confounds women who keep a* ſhop for vending merchandizes, with ſlaves, with women who keep taverns, with players, with the daughters of thoſe who keep public ſtews, or who had been condemned to fight in the amphitheatre: This had its original in the ancient inſtitutions of the Romans.

I am not ignorant that men prepoſſeſſed with theſe two ideas, that commerce is of the greateſt ſervice to a ſtate, and that the Romans had the beſt policied government in the world, have believed that they greatly honoured and encouraged commerce; but the truth is, they ſeldom troubled their heads about it.

CHAP.

*Quæ mercimoniis publicè præfuit. Leg. 5. cod. natural. liberis.

CHAP. XI.

Of the commerce of the Romans *with the Barbarians.*

THE Romans having erected a vaſt empire in Europe, Aſia, and Africa; the weakneſs of the people and the tyranny of their laws united all the parts of this immenſe body. The Roman policy was then to avoid all communication with thoſe nations whom they had not ſubdued: the fear of carrying to them the art of conquering, made them, neglect the art of inriching themſelves. They made laws to hinder all commerce with barbarians. "Let "nobody, ſaid (a) Valens and Gratian, ſend wine, "oil, or other liquors to the barbarians, though it "be only for them to taſte. Let no one carry gold "to them (b), adds Gratian, Valentinian, and Theodoſius; rather, if they have any, let our ſubjects deprive them of it by ſtratagem." The exportation (c) of iron was prohibited on pain of death. Book XXI. Chap. 11. & 12.

(a) Leg. ad barbaricum cod. *quæ res exportari non debeant.*

(b) Leg. 2. cod. *de commerc. & mercator.*

(c) Leg. 2. quæ res *exportati non debeant*, and Procopius, *war of the Perſians*, Book I.

Domitian, a prince of great timidity, ordered the (d) vines in Gaul to be rooted up; from a fear, no doubt, leſt their wines ſhould draw thither the barbarians. Probus and Julian, who had no ſuch fears, gave orders for their being planted again.

I am ſenſible that upon the declenſion of the Roman empire, the barbarians obliged the Romans to eſtabliſh ſtaple-towns (e), and to trade with them. But even this is a proof that the minds of the Romans were averſe to commerce.

(d) See the Chronicles of Euſebius and Cedrenus.

(e) See the Conſiderations on the cauſes of the riſe and declenſion of the Roman grandeur.

CHAP. XII.

Of the commerce of the Romans *with* Arabia, *and the* Indies.

THE trade to Arabia-Felix, and that to the Indies, were the two branches, and almoſt the only ones of their foreign commerce. The Arabs were

Book XXI. Chap. 12.

were formerly what they are at this day, equally addicted to trade and robbery. Their immenſe deſarts on the one hand, and the riches which ſtrangers went thither in ſearch of, produced theſe two effects. Theſe riches the Arabs found in their ſeas and foreſts; and as they ſold much and purchaſed little, they drew to (a) themſelves the gold and ſilver of the Romans. The Europeans trade with them ſtill in the ſame manner; the caravans of Aleppo, and the royal veſſel of Suez, carry thither immenſe ſums *.

(a) Pliny, Lib. vi. Chap. 28.

Their commerce to the Indies was very conſiderable. Strabo (b) had been informed in Egypt, that they employed in this navigation one hundred and twenty veſſels: this commerce was carried on entirely with bullion. They ſent thither annually fifty millions of ſeſterces. Pliny (c) ſays, that the merchandizes brought from thence were ſold at Rome at *Cent. per Cent.* profit. He ſpeaks, I believe, too generally; if this trade had been ſo vaſtly profitable, every body would have been willing to engage in it, and then it would have been at an end.

(b) Lib. ii. Pag. 81. of the edition printed 1587.

(c) Lib. vi. Cap. 23.

It will admit of a queſtion, whether, the trade to Arabia and the Indies, was of any advantage to the Romans? They were obliged to export their bullion thither, though they had not, like us, the reſource of America, which ſupplies what we ſend away. I am perſuaded that one of the reaſons of their increaſing the value of their ſpecies by eſtabliſhing baſe coin, was the ſcarcity of ſilver, owing to the continual exportation of it to the Indies: and though the commodities of this country were ſold at Rome at the rate of *cent. per cent.* this profit of the Romans, being obtained from the Romans themſelves, could not inrich the empire.

It

* The caravans of Aleppo and Suez carry thither annually the value of about two millions of livres, and as much more clandeſtinely; the royal veſſel of Suez carries thither alſo two millions.

It may be alledged, on the other hand, that this commerce increaſed the Roman fleet, and of courſe their power; that new merchandizes augmented their inland trade, gave encouragement to the arts, and employment to the induſtrious; that the number of ſubjects multiplied in proportion to the new means of ſupport; that this new commerce was productive of luxury, which I have proved to be as favourable to a monarchical government, as fatal to a common wealth; that this eſtabliſhment was of the ſame date as the fall of their republic; that the luxury of Rome was become neceſſary; and that it was extremely proper, that a city which had accumulated all the wealth of the univerſe, ſhould refund it by its luxury.

We ſhall ſay but one word on their inland trade. Its principal branch was the corn brought to Rome for the ſubſiſtence of the people: but this was rather a political affair, than a point of commerce. On this account the ſailors were favoured with ſome privileges (a), becauſe the ſafety of the empire depended on their vigilance.

(a) Suet. in Claudio, Leg. vii. Cod. Theodoſ. *de Navicularii.*

CHAP. XIII.

Of commerce after the deſtruction of the Weſtern Empire.

COmmerce was yet more undervalued after the invaſion of the Roman empire. The barbarous nations at firſt regarded it only as an opportunity for robbery; and when they had ſubdued the Romans, they honoured it no more than agriculture, and the other profeſſions of a conquered people.

Soon was the commerce of Europe almoſt intirely loſt. The nobility, who had every where the direction of affairs, were in no pain about it.

The laws of the (b) Viſigoths permitted private people to occupy half the beds of great rivers, provided the other half remained free for nets and boats.

(b) Lib. viii. Tit. 4. §. 9.

There

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There muſt have been very little trade in countries conquered by theſe barbarians.

In theſe times were eſtabliſhed the ridiculous rights of eſcheatage and ſhipwrecks. Theſe men thought, that as ſtrangers were not united to them by any civil law, they owed them on the one hand no kind of juſtice, and on the other no ſort of pity.

In the narrow bounds which nature had originally preſcribed to the people of the north, all were ſtrangers to them; and in their poverty they regarded all only as contributing to their riches. Being eſtabliſhed before their conqueſts on the coaſts of a ſea of very little breadth and full of rocks, from theſe very rocks they drew their ſubſiſtence.

But the Romans, who made laws for all the univerſe, had eſtabliſhed the moſt (a) humane ones with regard to ſhipwrecks. They ſuppreſſed the rapine of thoſe who inhabited the coaſts; and what was more ſtill, the rapaciouſneſs of their treaſuries (b).

(a) Toto titulo ff. *de incend. ruin. & naufrag.* & cod. *de naufragiis*, & leg. 3. ff. ad leg. Cornel. *de ſicariis.*

(b) Leg. 1. cod. *de Naufragiis.*

CHAP. XIV.
A particular regulation.

THE (c) law of the Viſigoths made however one regulation in favour of commerce. It ordained, that foreign merchants ſhould be judged, in the differences that aroſe amongſt themſelves, by the laws and by judges of their own nation. This was founded on an eſtabliſhed cuſtom among all mixed people, that every man ſhould live under his own law: A cuſtom of which I ſhall ſpeak more at large in another place.

(c) Lib. ii. Tit. 3. §. 2.

CHAP. XV.
Of commerce after the decay of the Roman *power in the Eaſt.*

THE Mahometans appeared, conquered, extended, and diſperſed themſelves. Egypt had particular ſovereigns; theſe carried on the commerce of

of India, and being poſſeſſed of the merchandizes of this country, drew to themſelves the riches of all other nations. The ſultans of Egypt were the moſt powerful princes of thoſe times. Hiſtory informs us with what a conſtant and well regulated force they ſtopped the ardor, the fire, and the impetuoſity of the cruſadoes. Book XXI. Chap. 16.

CHAP. XVI.

How commerce broke through the barbariſm of Europe.

ARISTOTLE's philoſophy being carried to the weſt, pleaſed the ſubtil Geniuſes, who were the virtuoſi of thoſe times of ignorance. The ſchoolmen were infatuated with it, and derived from hence (a) their doctrine on lending upon intereſt; this they confounded with uſury, and condemned. Hence commerce, which was the profeſſion only of mean perſons, became that of knaves: for whenever a thing is forbidden, which nature permits or neceſſity requires, thoſe who do it are looked upon as diſhoneſt.

(a) See Ariſtot. polit. Lib. 1. Cap. 9. & 10.

Commerce was transferred to a nation covered with infamy; and was ſoon rank'd with the moſt ſhameful uſury, with monopolies, with the levying of ſubſidies, and with all the diſhoneſt means of acquiring wealth.

The Jews *, inriched by their exactions, were pillaged by the tyranny of princes; which pleaſed indeed, but did not eaſe the people.

What paſſed in England may ſerve to give us an idea of what was done in other countries. King (b) John having impriſoned the Jews, in order to obtain their wealth; there were few who had not at leaſt

(b) Stowe's *Survey of London*, Book iii. Pag. 54.

* See in *Marca Hiſpanica* the conſtitutions of Arragon of the year 1228, and 1233; and in *Bruſſel*, the agreement of the year 1206, between the king, the counteſs of Champagne, and Guy of Dampierre.

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leaſt one of their eyes plucked out. Thus did that king influence his court of juſtice. A certain Jew who had a tooth pulled out every day for ſeven days ſucceſſively, gave ten thouſand marks of ſilver for the eighth. Henry III. extorted from Aaron a Jew, at York, fourteen thouſand marks of ſilver, and ten thouſand for the queen. In thoſe times they did by violence, what is now done in Poland with ſome ſemblance of moderation. As princes could not dive into the purſes of their ſubjects, becauſe of their privileges, they put the Jews to the torture, who were not conſidered as citizens.

At laſt a cuſtom was introduced of confiſcating the effects of thoſe Jews who embraced chriſtianity. This ridiculous cuſtom is known only by the (a) law, which ſuppreſſed it. The moſt vain and trifling reaſons were given in juſtification of that proceeding; it was alledged, that it was proper to try them, in order to be certain that they had entirely ſhook off the ſlavery of the devil. But it is evident, that this confiſcation was a ſpecies of the right of * amortiſation, to recompence the prince, or the lords for the taxes levied on the Jews, which ceaſed on their embracing chriſtianity. In thoſe times men, like lands, were regarded as property. I cannot help remarking by the way how this nation has been ſported with from one age to another; at one time, their effects were confiſcated when they were willing to become chriſtians; and at another, if they refuſed to turn chriſtians, they were ordered to be burnt.

(a) The Edict paſſed at Baville, April 4, 1392.

In the mean time, commerce was ſeen to ariſe from the boſom of vexation and deſpair. The Jews, proſcribed by turns from every country, found out the way of ſaving their effects. By this means they rendered

* In France the Jews were ſlaves in mortmain, and the lords their ſucceſſors. Mr. Bruſſel mentions an agreement made in the year 1206, between the king and Thibaut count of Champaign, by which it was agreed, that the Jews of the one ſhould not lend in the lands of the other.

rendered their retreats for ever fixed; for though princes might have been willing to get rid of their perſons, yet they did not chuſe to get rid of their money.

The * Jews invented letters of exchange; commerce, by this means became capable of eluding violence, and of maintaining every where its ground; the richeſt merchant having none but inviſible effects, which he could convey imperceptibly where-ever he pleaſed.

The theologians were obliged to limit their principles; and commerce, which they had before connected by main force with knavery, re-entered, if I may ſo expreſs myſelf, the boſom of probity.

Thus we owe to the ſpeculations of the ſchoolmen all the misfortunes which accompanied the deſtruction of commerce; and to the avarice of princes, the eſtabliſhment of a practice which puts it in ſome meaſure out of their power.

From this time it became neceſſary, that princes ſhould govern with more prudence, than they themſelves could ever have imagined: for great exertions of authority were, in the event, found to be impolitic; and, from experience it is manifeſt, that nothing but the goodneſs and lenity of a government can make it flouriſh.

We begin to be cured of Machiaveliſm, and recover from it every day. More moderation is become neceſſary in the councils of princes. What would formerly have been called a maſter-ſtroke in politics, would be now, independent of the horror it might occaſion, the greateſt imprudence.

Happy it is for men that they are in a ſituation, in which, though their paſſions prompt them to be

* It is known, that under Philip Auguſtus and Philip the Long, the Jews who were chaſed from France took refuge in Lombardy, and that there they gave to foreign merchants and travellers, ſecret letters drawn upon thoſe to whom they had intruſted their effects in France, which were accepted.

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wicked, it is however for their intereſt to be humane and virtuous.

CHAP. XVII.

The diſcovery of two new worlds, and in what manner Europe *is affected by it.*

THE compaſs opened, if I may ſo expreſs myſelf, the univerſe. Aſia and Africa were found, of which only ſome borders were known; and America of which we knew nothing.

The Portugueſe, ſailing on the Atlantic ocean, diſcovered the moſt ſouthern point of Africa; they ſaw a vaſt ſea, which carried them to the Eaſt-Indies. Their dangers upon this ſea, the diſcovery of Mozambique, Melinda, and Calicut, have been ſung by the Camoens, whoſe poem makes us feel ſomething of the charms of the Odyſſey, and the magnificence of the Æneid.

The Venetians had hitherto carried on the trade of the Indies through the Turkiſh dominions, and purſued it in the midſt of oppreſſions and diſcouragements. By the diſcovery of the Cape of Good-hope, and thoſe which were made ſome time after, Italy was no longer the centre of the trading world; it was, if I may be permitted the expreſſion, only a corner of the univerſe, and is ſo ſtill. The commerce even of the Levant depending now on that of the great trading nations to both the Indies, Italy can be no more than an acceſſory.

The Portugueſe traded to the Indies in right of conqueſt. The (a) conſtraining laws, which the Dutch at preſent impoſe on the commerce of the little Indian princes, had been eſtabliſhed before by the Portugueſe.

(a) See the Relation of Fr. Pirard, Part 2. Chap. 15.

The fortune of the houſe of Auſtria was prodigious. Charles V. ſucceeded to the poſſeſſion of Burgundy, Caſtile, and Arragon; he arrived afterwards at the imperial dignity; and to procure him a new kind

kind of grandeur, the univerſe extended itſelf, and there was ſeen a new world paying him obeiſance.

Chriſtopher Columbus diſcovered America; and though Spain ſent thither only a force ſo ſmall that the leaſt prince in Europe could have ſent the ſame; yet it ſubdued two vaſt empires, and other great ſtates.

While the Spaniards diſcovered and conquered the weſt, the Portugueſe puſhed their conqueſts and diſcoveries in the eaſt. Theſe two nations met each other; they had recourſe to pope Alexander VI. who made the celebrated line of partition, and adjudged the great proceſs.

But the other nations of Europe would not ſuffer them quietly to enjoy their ſhares. The Dutch chaſed the Portugueſe from almoſt all their ſettlements in the Eaſt Indies; and ſeveral other nations planted colonies in America.

The Spaniards conſidered theſe new-diſcovered countries, as the ſubject of conqueſt: while others, more refined in their views, found them to be the proper ſubjects of commerce, and upon this principle directed their proceedings. Hence ſeveral nations have conducted themſelves with ſo much wiſdom, that they have given a kind of ſovereignty to companies of merchants, who governing theſe far diſtant countries only with a view to trade, have made a great acceſſary power, without embarraſſing the principal ſtate.

The colonies they have formed are under a kind of dependance, of which there is ſcarcely an inſtance in all the colonies of the ancients; whether we conſider them as holding of the ſtate itſelf, or of ſome trading company eſtabliſhed in the ſtate.

The deſign of theſe Colonies is to trade on more advantageous conditions than could otherwiſe be done with the neighbouring people, with whom all advantages are reciprocal. It has been eſtabliſhed,

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that the * metropolis alone ſhall trade in the colonies, and that from very good reaſon; becauſe the deſign of the ſettlement was the extenſion of commerce, not the foundation of a city, or a new empire.

Thus it is ſtill a fundamental law of Europe, that all commerce with a foreign colony ſhall be regarded as a mere monopoly, puniſhable by the laws of the country; and in this caſe we are not to be directed by the laws and precedents of the † ancients, which are not at all applicable.

It is likewiſe acknowledged, that a commerce eſtabliſhed between the mother countries does not include a permiſſion to trade in the colonies; for theſe always continue in a ſtate of prohibition.

The diſadvantage of a colony that loſes the liberty of commerce, is viſibly compenſated by the protection of the mother country, who defends it by her arms, or ſupports it by her laws.

From hence follows a third law of Europe, that when a foreign commerce with a colony is prohibited, it is not lawful to trade in their ſeas, except in ſuch caſes as are excepted by treaty.

Nations who are with reſpect to the whole univerſe, what individuals are in a ſtate, like theſe are governed by the law of nature, and by particular laws of their own making. One nation may reſign to another the ſea, as well as the land. The Carthaginians forbad (a) the Romans to ſail beyond certain limits, as the Greeks had obliged the King of Perſia to keep as far diſtant from the ſea-coaſt § as a horſe could gallop.

(a) Polybius, Lib. iii.

The great diſtance of our colonies is not an inconvenience that affects their ſafety; for if the mother

* This, in the language of the ancients, is the ſtate which founded the colony.

† Except the Carthaginians, as we ſee by the treaty which put an end to the firſt Punic war.

§ The king of Perſia obliged himſelf by treaty, not to ſail with any veſſel of war beyond the Scyanean Rocks, and the Chelidonean Iſles. *Plutarch's Life of Cymon.*

ther country, on whom they depend for their defence, is far diſtant, no leſs diſtant are thoſe nations by whom they may be afraid of being conquered.

Beſides, this diſtance is the cauſe that thoſe who are eſtabliſhed there cannot conform to the manner of living in a climate ſo different from their own; they are obliged therefore to draw from the mother-country all the conveniencies of life. The (a) Carthaginians, to render the Sardinians and Corſicans more dependent, forbad their planting, ſowing, or doing any thing of the like kind under pain of death; ſo that they ſupplied them with neceſſaries from Africa. Our colonies in the Caribbee iſlands are under an admirable regulation in this reſpect; the ſubject of their commerce is what we neither have, nor can produce; they want what is the ſubject of ours.

(a) Ariſtotle *on wonderful things.* Livy, Lib. vii. Dec. 2.

A conſequence of the diſcovery of America was the connecting Aſia and Africa with Europe; it furniſhed materials for a trade with that vaſt part of Aſia, known by the name of the Eaſt-Indies. Silver, that metal ſo uſeful as the medium of commerce, became now as a merchandize, the baſis of the greateſt commerce in the world. In fine, the navigation to Africa became neceſſary, in order to furniſh us with men to labour in the mines, and to cultivate the lands of America.

Europe is arrived to ſo high a degree of power, that nothing in hiſtory can be compared to it. Whether we conſider the immenſity of its expences, the grandeur of its engagements, the number of its troops, and the regular payment even of thoſe that are leaſt ſerviceable, and which are kept only for oſtentation.

Father Duhalde ſays, (b), that the interior trade of China is much greater than that of all Europe. That might be, if our foreign trade did not augment our inland commerce. Europe carries on the trade and navigation of the other three parts of the

(b) Tome II. Pag. 170.

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world; as France, England, and Holland, do nearly that of Europe.

CHAP. XVIII.

Of the riches which Spain *drew from* America.

IF Europe * has derived ſo many advantages from the American trade, it ſeems natural to imagine, that Spain muſt have derived much greater. She drew from the newly-diſcovered world ſo prodigious a quantity of gold and ſilver, that all we had before could not be compared to it.

But (what one could never have expected) this great kingdom was every where baffled by its misfortunes. Philip II. who ſucceeded Charles V. was obliged to make the celebrated bankruptcy known to all the world. There never was a prince who ſuffered more from the murmurs, the inſolence, and the revolt of troops conſtantly ill paid.

From this time the monarchy of Spain has been inceſſantly declining. This has been owing to an interior and phyſical defect in the nature of theſe riches, which renders them vain; a defect which increaſes every day.

Gold and ſilver are either a fictitious, or a repreſentative wealth. The repreſentative ſigns of wealth are extremely durable, and in their own nature, but little ſubject to decay. But the more they are multiplied, the more they loſe their value, becauſe the fewer are the things which they repreſent.

The Spaniards, after the conqueſt of Mexico and Peru, abandoned their natural riches, in purſuit of a repreſentative wealth which daily degraded itſelf. Gold and ſilver were extremely ſcarce in Europe; and Spain becoming all of a ſudden miſtreſs of a prodigious quantity of theſe metals, conceived hopes to

* This has been already ſhewn in a ſmall treatiſe, publiſhed by the author about twenty years ago; which has been almoſt intirely incorporated in the preſent work.

to which they never before aſpired. The wealth they found in the conquered countries, great as it was, did not however equal thoſe of their mines. The Indians concealed part of them, and beſides theſe people, who made no other uſe of gold and ſilver than to give magnificence to the temples of their gods, and to the palaces of their kings, ſought not for it with an avarice like ours. In ſhort, they had not the ſecret of drawing theſe metals from every mine; but only from thoſe in which the ſeparation might be made with fire: They were ſtrangers to the manner of making uſe of mercury, and perhaps to mercury itſelf.

However, it was not long before the ſpecie of Europe was doubled; this appeared from the price of commodities which every where was doubled.

The Spaniards raked into the mines, ſcooped out mountains, invented machines to draw out water, to break the ore and ſeparate it; and, as they ſported with the lives of the Indians, they forced them to labour without mercy. As the ſpecie of Europe ſoon doubled, the profit of Spain diminiſhed in the ſame proportion, and they had every year the ſame quantity of metal, which was become by one half leſs precious.

In double the time the ſpecie ſtill doubled, and the profit ſtill diminiſhed another half.

It diminiſhed even more than half: let us ſee in what manner.

To extract the gold from the mines, to give it the requiſite preparations, and to import it into Europe, muſt be attended with ſome certain expence; I will ſuppoſe this to be as 1 to 64. When the ſpecie was once doubled, and conſequently became by one half leſs precious, the expence was as 2 to 64. Thus the galleons which brought to Spain the ſame quantity of gold, brought a thing which really was of leſs value by one half, though the expences attending it had been one half more.

If

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If we proceed doubling and doubling, we ſhall find in this progreſſion the cauſe of the impotency of the wealth of Spain.

It is about two hundred years ſince they have worked their Indian mines. I ſuppoſe the quantity of ſpecie at preſent in the trading world is to that before the diſcovery of the Indies, as 32 is to 1; that is, it has been doubled five times: in two hundred years more the ſame quantity will be to that before the diſcovery, as 64 is to 1; that is, it will be doubled once more. Now at preſent, fifty (a) quintals of ore yield four, five, and ſix ounces of gold; and when it yields only two, the miner receives no more from it than his expences. In two hundred years, when the miner will extract only four, this too will only defray his charges. There will then be but little profit to be drawn from the gold mines. The ſame reaſoning will hold good of ſilver, except that the working of the ſilver mines is a little more advantageous than thoſe of gold.

(a) See Frezier's Voyages.

But if mines ſhould be diſcovered ſo fruitful as to give a much greater profit, the more fruitful they will be, the ſooner the profit will ceaſe.

The Portugueſe in Brazil have found mines of gold ſo rich, that they muſt neceſſarily very ſoon make a conſiderable diminution in the profits of thoſe of Spain, as well as in their own.

I have frequently heard people deplore the blindneſs of Francis the firſt's council, who repulſed Chriſtopher Columbus, when he made the propoſal of diſcovering the Indies. Indeed they did, tho' perhaps without deſign, an act of the greateſt wiſdom. Spain has behaved like the fooliſh king, who deſired that every thing he touched might be converted into gold; and who was obliged to beg of the gods to put an end to his miſery.

The companies and banks eſtabliſhed in many nations, have put a finiſhing ſtroke to the lowering of gold and ſilver, as a ſign or repreſentation of riches; for

for by new fictions they have multiplied in such a manner the signs of wealth, that gold and silver having this office only in part, are become less precious.

Thus publick credit serves instead of mines, and diminishes the profit, which the Spaniards draw from theirs.

True it is, that the Dutch trade to the East-Indies has increased in some measure, the value of the Spanish merchandize; for, as they carry bullion, and give it in exchange for the merchandizes of the east, they ease the Spaniards of part of a commodity, which, in Europe, abounds too much.

And this trade, which may indirectly be regarded as that of Spain, is as advantageous to that nation, as to those who are directly employed in carrying it on.

From what has been said, we may form a judgment of the last order of the council of Spain, which prohibits the making use of gold and silver in gildings and other superfluities: a decree as ridiculous as it would be for the states of Holland to prohibit the consumption of spices.

My reasoning does not hold good against all mines; those of Germany and Hungary, which produce little more than the expence of working them, are extremely useful. They are found in the principal state; they employ many thousand men, who there consume their superfluous commodities; they are properly a manufacture of the country.

The mines of Germany and Hungary promote the culture of land; the working of those of Mexico and Peru destroys it.

The Indies and Spain, are two powers under the same master; but the Indies are the principal, while Spain is only an accessory. 'Tis in vain for politics to attempt to bring back the principal to the accessory; the Indies will always draw Spain to themselves.

Of merchandizes to the value of about 50 millions of livres annually sent to the Indies, Spain furnishes only two millions and a half: the Indies trade for fifty millions, the Spaniards for two and a half.

That

That muſt be a bad kind of riches which depends on accident, and not on the induſtry of a nation, on the number of its inhabitants, and on the cultivation of its lands. The king of Spain, who receives great ſums from his cuſtom-houſe at Cadiz, is in this reſpect only a rich individual in a ſtate extremely poor. Every thing paſſes between ſtrangers and himſelf, while his ſubjects have ſcarcely any ſhare in it: this commerce is independent both of the good and bad fortune of his kingdom.

Were ſome provinces of Caſtile able to give him a ſum equal to that of the cuſtom-houſe of Cadiz, his power would be much greater; his riches would be the effect of the wealth of the country: theſe provinces would animate all the others, and they would be altogether more capable of ſupporting their reſpective charges: inſtead of a great treaſury, he would have a great people.

CHAP. XIX.

A problem.

IT is not for me to decide the queſtion, whether if Spain be not herſelf able to carry on the trade of the Indies, it would not be better to leave it open to ſtrangers. I will only ſay, that it is for their advantage to load this commerce with as few obſtacles as politics will permit. When the merchandizes, which ſeveral nations ſend to the Indies, are very dear, the inhabitants of that country give a great deal of their commodities which are gold and ſilver, for very little of thoſe of foreigners: the contrary to this happens when they are at a low price. It would perhaps be of uſe that theſe nations ſhould underſell each other, that by this means the merchandizes carried to the Indies might be always cheap. Theſe are principles which deſerve to be examined, without ſeparating them however from other conſiderations; the ſafety of the Indies, the advantages of one only cuſtom houſe,

tom-houſe, the danger of making great alterations, and the foreſeen inconveniences, which are often leſs dangerous than thoſe which cannot be foreknown. Book XXI. Chap. 19.

BOOK XXII.

Of laws in relation to the uſe of money.

CHAP. I.

The reaſon of the uſe of money.

PEOPLE who have few merchandizes as ſavages, and among civilized nations, thoſe who have only two or three ſpecies, trade by exchange. Thus the caravans of Moors who go to Tambactu, in the heart of Africa, have no need of money, for they exchange their ſalt for gold. The Moor puts his ſalt in an heap, and the Negro his duſt in another; if there is not gold enough, the Moor takes away ſome of his ſalt, or the Negro adds more gold, till both parties are agreed. Book XXII. Chap. 1.

But when a nation traffics with a great variety of merchandizes, money becomes neceſſary; becauſe a metal eaſily carried from place to place, ſaves the great expences which people would be obliged to be at, if they always proceeded by exchange.

All nations having reciprocal wants, it frequently happens that one is deſirous of a large quantity of the others merchandizes, when the latter will have very little of theirs, though with reſpect to another nation the caſe is directly oppoſite. But when nations have money, and proceed by buying and ſelling, thoſe who take moſt merchandizes pay the balance in ſpecie. And there is this difference, that in the caſe of buying, the trade carried on is in proportion to the wants of the nation, that has the greateſt demands; whilſt in bartering, the trade is only according to the wants of the nation, whoſe demands

are

Book XXII. Chap. 2.

are the feweſt: without which this laſt would be under an impoſſibility of balancing its accounts.

CHAP. II.

Of the nature of money.

MOney is a ſign which repreſents the value of all merchandizes. Metal is taken for this ſign as being durable *, becauſe it conſumes but little by uſe: and becauſe without being deſtroyed, it is capable of many diviſions. A precious metal has been choſen as a ſign, as being moſt portable. A metal is moſt proper for a common meaſure, becauſe it can be eaſily reduced to the ſame ſtandard. Every ſtate fixes upon it a particular impreſſion, to the end that the form may correſpond with the ſtandard and the weight, and that both may be known by inſpection only.

The Athenians, not having the uſe of metals, made uſe of oxen †, and the Romans of ſheep: but one ox is not the ſame as another ox, in the manner that one piece of metal may be the ſame as another.

As ſpecie is the ſign of the value of Merchandizes, paper is the ſign of the value of ſpecie; and when it is of the right ſort, it repreſents this value in ſuch a manner, that as to the effects produced by it, there is not the leaſt difference.

In the ſame manner, as money is the ſign and repreſentative of a thing, every thing is the ſign and repreſentative of money; and the ſtate is in a proſperous condition, when, on the one hand, money perfectly repreſents all things; and, on the other, all things perfectly repreſent money, and are reciprocally the ſign of each other; that is, they have ſuch

* The ſalt made uſe of for this purpoſe in Abyſſinia has this defect, that it is continually waſting away.

† Herodotus, in Clio, tells us, that the Lydians found out the art of coining money; the Greeks learnt it from them; the Athenian coin had the impreſſion of their ancient ox. I have ſeen one of theſe pieces in the earl of Pembroke's cabinet.

ſuch a relative value, that we may have the one as ſoon as we have the other. This never happens in any other than a moderate government, nor does it always happen there: for example, if the laws favour the diſhoneſt debtor, his effects are no longer a repreſentative or ſign of money. With regard to a deſpotic government, it would be a prodigy, did things there repreſent their ſign. Tyranny and diſtruſt make every one bury *their ſpecie: things are not there then the repreſentative of money.

Legiſlators have ſometimes had the art, not only to make things in their own nature, the repreſentative of ſpecie, but to convert them even into ſpecie, like the current coin. Cæſar, when he was(a)dictator, permitted debtors to give their lands in payment to their creditors, at the price they were worth before the civil war. (b) Tiberius ordered, that thoſe who deſired ſpecie ſhould have it from the public treaſury, on binding over their land to double the value. Under Cæſar, the lands were the money which payed all debts: under Tiberius, ten thouſand ſeſterces in land became as current money, equal to five thouſand ſeſterces in ſilver.

(a) Cæſar *on the Civil War*, Book iii.

(b) Tacitus, Lib. vi.

The Magna Charta of England provides againſt the ſeizing the lands or revenues of a debtor, when his real or perſonal goods are ſufficient to pay, and he is willing to give them up to his creditors: by this means all the goods of an Engliſhman repreſented money.

The laws of the Germans conſtituted money a ſatisfaction for the injuries that were committed, and for the ſufferings due to guilt. But as there was but very little ſpecie in the country, they again conſtituted this money to be paid in goods or chattles. This we find appointed in a Saxon law: with certain regulations ſuitable to the eaſe and convenience of the

* It is an ancient cuſtom in Algiers, for the father of a family to have a treaſure concealed in the earth. *Hiſt. of the Kingdom of Algiers, by Logier de Taſſis.*

Book XXII. Chap. 3.

the ſeveral ranks of people. At firſt (a) the law declared the value of a ſou in cattle; the ſou of two tremiſes anſwered to an ox of twelve months, or an ewe with her lamb; that of three tremiſes, was worth an ox of ſixteen months. With theſe people money became cattle, goods, and merchandize; and theſe again became money.

(a) The Laws of the Saxons Chap. 18.

Money is not only a ſign of things; it is alſo a ſign and repreſentative of money, as we ſhall ſee in the chapter on exchange.

CHAP. III.

Of ideal money.

THERE is both real and ideal money. Civilized nations generally make uſe of ideal money only, becauſe they have converted their real money into ideal. At firſt their real money was ſome metal of a certain weight and ſtandard: but ſoon diſhoneſty or want made them retrench a part of the metal from every piece of money, to which they left the ſame name; for example, from a livre at a pound weight they took half the ſilver, and ſtill continued to call it a livre; the piece which was the twentieth part of a pound of ſilver, they continued to call a ſou, though it was no more the twentieth part of this pound of ſilver. By this means the livre is an ideal livre, and the ſou an ideal ſou. Thus, of the other ſubdiviſions; and ſo far may this be carried, that what we call a livre may be only a ſmall part of the original livre or pound, which renders it ſtill more ideal. It may even happen, that we may have no piece of money of the preciſe value of a livre, nor any piece exactly worth a ſou: then the livre and the ſou will be purely ideal. They may give to any piece of money the denomination of as many livres and as many ſous as they pleaſe; the variation may be continual; becauſe it is as eaſy to give

give another name to a thing, as it is difficult to change the thing itſelf. Book XXII. Chap. 4. & 5.

To take away the ſource of this abuſe, it would be an excellent law for all countries, who are deſirous of making commerce flouriſh, to ordain, that none but real money ſhould be current; and, to prevent any methods from being taken, to render it ideal.

Nothing ought to be ſo exempt from variation, as that which is the common meaſure of all.

Trade is in its own nature extremely uncertain: and it is a great evil to add a new uncertainty to that which is founded on the nature of the thing.

CHAP. IV.

Of the quantity of gold and ſilver.

WHILE civilized nations are the miſtreſſes of the world, gold and ſilver, whether they draw it from amongſt themſelves, or fetch it from the mines, muſt increaſe every day. On the contrary, it diminiſhes when barbarous nations prevail. We know how great was the ſcarcity of theſe metals, when the Goths and Vandals on the one ſide, and on the other the Saracens and Tartars, broke in like a torrent on the civilized world.

CHAP. V.

The ſame ſubject continued.

THE bullion drawn from the American mines, imported into Europe, and from thence ſent to the eaſt, has greatly promoted the navigation of the European nations; for it is a merchandize which Europe receives in exchange from America, and which ſhe ſends in exchange to the Indies. A prodigious quantity of gold and ſilver is therefore an advantage, when we conſider theſe metals as a merchandize: but, 'tis otherwiſe when we conſider them

Book XXII. Chap. 6.

as a ſign; becauſe their abundance gives an allay to their quality as a ſign, which is chiefly founded on their ſcarcity.

Before the firſt Punic war, copper was to ſilver as (a) 960 to 1 *: it is at preſent nearly as 73 and a half to 1. When the proportion ſhall be as it was formerly, ſilver will better perform its office as a ſign.

(a) See Chap. 12. of this Book.

CHAP. VI.

The reaſon why the price of uſury was lowered one half after the conqueſt of the Indies.

THE Ynca Garcilaſſo informs us (b), that in Spain after the conqueſt of the Indies, the intereſt which was at ten *per cent.* fell to five. This was a neceſſary conſequence. A great quantity of ſpecie being all of a ſudden brought into Europe, much fewer perſons had need of money. The price of all things increaſed, while the value of money diminiſhed; the proportion was then broken, and all the old debts were diſcharged. We may recollect the time of the ſyſtem †; when every thing was at a high price except ſpecie. Thoſe who had money after the conqueſt of the Indies, were obliged to lower the price or hire of their merchandize; that is, in other words, their intereſt.

(b) Hiſt. of the Civil Wars of the Spaniards in the Indies.

From this time they were unable to bring uſury to its ancient ſtandard, becauſe the quantity of ſpecie brought to Europe has been annually increaſing. Beſides, as the public funds of ſome ſtates, founded on riches procured by commerce, gave but a very ſmall intereſt, it became neceſſary for the contracts of individuals to be regulated by theſe. In ſhort, the courſe of exchange having rendered the conveying of one ſpecie from one country to another remarkably eaſy, money cannot be ſcarce in a place where

* Suppoſing a mark or eight ounces of ſilver to be worth forty nine livres, and copper twenty ſols *per* pound.

† In France, Mr. Law's project was called by this name.

where it pours in on all ſides, from thoſe who are plentifully ſtocked with it.

CHAP. VII.

How the price of things is fixt in the variation of the ſign of riches.

MOney is the price of merchandizes or manufactures. But, how ſhall we fix this price? or in other words, by what piece of money is every thing to be repreſented?

If we compare the maſs of gold and ſilver in the whole world, with the quantity of merchandizes therein contained, it is certain that every commodity or merchandize in particular, may be compared to a certain portion of the intire maſs of gold and ſilver. As the total of the one is to the total of the other, ſo part of the one will be to part of the other. Let us ſuppoſe, that there is only one commodity or merchandize in the world, or only one to be purchaſed, and that this is diviſible like money: a part of this merchandize will anſwer to a part of the maſs of gold and ſilver; the half of the total of the one, to the half of the total of the other; the tenth, the hundredth, the thouſandth part of the one, to the tenth, the hundredth, the thouſandth part of the other. But as that which conſtitutes property amongſt mankind is not all at once in trade; and as the metals or money, which are the ſign of property, are not all in trade at the ſame time; the price is fixed in a compound ratio of the total of things with the total of ſigns, and that of the total of things in trade with the total of ſigns in trade alſo: And as the things which are not in trade to-day may be in trade to-morrow, and the ſigns not now in trade may enter into trade at the ſame time, the eſtabliſhment of the price of things always fundamentally depends on the proportion of the total of things to the total of ſigns.

Book XXII. Chap. 8.

Thus the prince or the magiſtrate can no more aſcertain the value of merchandizes, than he can eſtabliſh by a decree that the relation one has to ten, is equal to that of one to twenty. Julian's (a) lowering the price of proviſions at Antioch, was the cauſe of a moſt terrible famine.

(a) *Hiſtory of the Church*, by Socrates.

CHAP. VIII.

The ſame Subject continued.

THE negroes on the coaſt of Africa have a ſign of value without money. It is a ſign merely ideal, founded on the degree of eſteem which they fix in their minds for every merchandize, in proportion to the need they have of it. A certain commodity or merchandize is worth three macoutes; another, ſix macoutes; another, ten macoutes; that is, as if they ſaid ſimply three, ſix, and ten. The price is formed by a compariſon of all merchandizes with each other. They have therefore no particular money; but each kind of merchandize is money to the other.

Let us for a moment transfer to ourſelves this manner of valuing things, and join it with ours: all the merchandizes and goods in the world, or elſe all the merchandizes or manufactures of a ſtate, particularly conſidered as ſeparate from all others, would be worth a certain number of macoutes; and, dividing the money of this ſtate into as many parts as there are macoutes, one part of this diviſion of money will be the ſign of a macoute.

If we ſuppoſe the quantity of ſpecie in a ſtate doubled, it will be neceſſary to double the ſpecie in the macoute; but if, in doubling the ſpecie, you double alſo the macoute, the proportion will remain the ſame as before the doubling of either.

If ſince the diſcovery of the Indies, gold and ſilver have increaſed in Europe in the proportion of one to twenty, the price of proviſions and merchandizes muſt

muſt have been inhanced in proportion of one to twenty. But if, on the other hand, the number of merchandizes has increaſed as one to two, it neceſſarily follows, that the price of theſe merchandizes and proviſions having been raiſed in proportion of one to twenty, and fallen in proportion of one to two, it neceſſarily follows, I ſay, that the proportion is only as one to ten.

The quantity of goods and merchandizes increaſes by an augmentation of commerce, the augmentation of commerce by an augmentation of the ſpecie which ſucceſſively arrives, and by new communications with freſh diſcovered countries and ſeas, which furniſh us with new commodities and new merchandizes.

CHAP. IX.

Of the relative ſcarcity of gold and ſilver.

BEſides the poſitive plenty and ſcarcity of gold and ſilver, there is ſtill a relative abundance, and a relative ſcarcity of one of theſe metals compared to the other.

The avaricious hoard up their gold and ſilver, becauſe as they do not care to ſpend, they are fond of ſigns that are not ſubject to decay. They prefer gold to ſilver, becauſe as they are always afraid of loſing, they can beſt conceal that which takes up the leaſt room. Gold therefore diſappears when there is plenty of ſilver, becauſe every one has ſome to conceal; it appears again when ſilver is ſcarce, becauſe they are obliged to draw it from its confinement.

It is then a rule: that gold is common when ſilver is ſcarce, and gold is ſcarce when ſilver is common. This lets us ſee the difference between their relative, and their real abundance and ſcarcity: of which I ſhall preſently ſpeak more at large.

CHAP. X.
Of exchange.

Book XXII. Chap. 10.

THE relative abundance and ſcarcity of ſpecie in different countries form what is called the courſe of exchange.

Exchange is a fixing of the actual and momentary value of money.

Silver, as a metal, has a value like all other merchandizes, and an additional value as it is capable of becoming the ſign of other merchandizes. If it was no more than a mere merchandize, it would, no doubt, loſe much of its value.

Silver, as money, has a value, which the prince in ſome reſpects can fix, and in others he cannot.

The prince eſtabliſhes a proportion between a quantity of ſilver as metal, and the ſame quantity as money. 2. He fixes the proportion between the ſeveral metals made uſe of as money. 3. He eſtabliſhes the weight and ſtandard of every piece of money. In fine, 4. he gives to every piece that ideal value, of which I have ſpoken. I ſhall call the value of money in theſe four reſpects its *poſitive value*, becauſe it may be fixed by law.

The coin of every ſtate has, beſides this, a *relative* value, as it is compared with the money of other countries. This relative value is eſtabliſhed by the exchange; and greatly depends on its poſitive value. It is fixed by the general opinion of the merchants, never by the decrees of the prince; becauſe it is ſubject to inceſſant variations, and depends on a thouſand accidents.

The ſeveral nations in fixing this relative value, are chiefly guided by that which has the greateſt quantity of ſpecie. If ſhe has as much ſpecie as all the others together, it is then moſt proper for the others to regulate theirs by her ſtandard; and this regulation between all the others will pretty nearly

agree

agree with the regulation made with this principal nation. BOOK XXII, Chap. 10.

In the actual ſtate of the univerſe, * Holland is the nation we are ſpeaking of. Let us examine the courſe of exchange with relation to her.

They have in Holland a piece of money called a florin, worth twenty pence, or forty half-pence or gros. But, to render our ideas as ſimple as poſſible, let us imagine that they have not any ſuch piece of money in Holland as a florin, and that they have no other but the gros: a man who ſhould have a thouſand florins, would have forty thouſand gros; and ſo of the reſt. Now the exchange with Holland is determined by our knowing how many gros every piece of money in other countries is worth; and as we in France commonly reckon by a crown of three livres, the exchange makes it neceſſary for us to know how many gros are contained in a crown of three livres. If the courſe of exchange is at fifty-four, a crown of three livres will be worth fifty-four gros; if it is at ſixty, it will be worth ſixty gros. If ſilver is ſcarce in France, a crown of three livres will be worth more gros; if plentiful, it will be worth leſs.

This ſcarcity or plenty, from whence reſults the mutability of the courſe of exchange, is not the real, but a relative ſcarcity or plenty. For example; when France has greater occaſion for funds in Holland, than the Dutch of having funds in France, ſpecie is ſaid to be common in France, and ſcarce in Holland; and *vice verſa*.

Let us ſuppoſe that the courſe of exchange with Holland is at fifty-four. If France and Holland compoſed only one city, they would act as we do when we give change for a crown: The Frenchman would take three livres out of his pocket, and the Dutchman fifty-four gros from his. But as there is

* The Dutch regulate the exchange for almoſt all Europe, by a kind of determination amongſt themſelves; in a manner moſt agreeable to their own intereſts.

BOOK XXII. Chap. 10.

ſome diſtance between Paris and Amſterdam, it is neceſſary that he who for my crown of three livres, gives me fifty-four gros which he has in Holland, ſhould give me a bill of exchange for fifty-four gros payable in Holland. The fifty-four gros is not the thing in queſtion; but a bill for that ſum. Thus, in order to judge of the * ſcarcity or plenty of ſpecie, we muſt know if there are in France more bills of fifty-four gros drawn upon Holland, than there are crowns drawn upon France. If there are more bills from Holland, than there are from France, ſpecie is ſcarce in France, and common in Holland; it then becomes neceſſary that the exchange ſhould riſe, and that they give for my crown more than fifty-four gros; otherwiſe I will not part with it, and *vice verſa*.

Thus the various turns in the courſe of exchange form an account of debtor and creditor, which muſt be frequently ſettled, and which the ſtate in debt can no more diſcharge by exchange, than an individual can pay a debt by giving change for a piece of ſilver.

We will ſuppoſe that there are but three ſtates in the world, France, Spain, and Holland; that ſeveral individuals in Spain are indebted to France to the value of one hundred thouſand (a) marks of ſilver; and that ſeveral individuals of France owe in Spain one hundred and ten thouſand marks; now, if ſome circumſtance both in Spain and France ſhould cauſe each ſuddenly to withdraw his ſpecie, what will then be the courſe of exchange? Theſe two nations will reciprocally acquit each other of an hundred thouſand marks: but France will ſtill owe ten thouſand marks in Spain, and the Spaniards will ſtill have bills upon France to the value of ten thouſand marks; while France will have none at all upon Spain.

(a) A mark is a weight of eight ounces.

But if Holland was in a contrary ſituation with reſpect to France, and in order to balance their account

* There is much ſpecie in a place, when there is more ſpecie than paper; there is little, when there is more paper than ſpecie.

count muſt pay her ten thouſand marks, the French would have two ways of paying the Spaniards; either by giving their creditors in Spain bills for ten thouſand marks upon their debtors in Holland, or elſe by ſending ſpecie to the value of ten thouſand marks in Spain.

From hence it follows, that when a ſtate has occaſion to remit a ſum of money into another country, it is indifferent in the nature of the thing, whether ſpecie be conveyed thither, or they take bills of exchange. The advantage or diſadvantage of theſe two methods ſolely depends on actual circumſtances. We muſt enquire which will yield moſt gros in Holland, money carried thither in ſpecie, or a bill upon Holland for the like ſum.*

When money of the ſame ſtandard and weight in France yields money of the ſame ſtandard and weight in Holland, we ſay that the exchange is at par. In the actual ſtate of ſpecie (a) the par is nearly at fifty-four gros to the crown. When the exchange is above fifty-four gros, we ſay it is high: when beneath, we ſay it is low.

(a) In 1744.

In order to know the loſs and gain of a ſtate, in a particular ſituation of exchange, it muſt be conſidered as debtor and creditor, as buyer and ſeller. When the exchange is below par, it loſes as debtor, and gains as creditor; it loſes as buyer, and gains as ſeller. 'Tis obvious, it loſes as debtor: ſuppoſe, for example, France owes Holland a certain number of gros, the fewer gros there are in a crown, the more crowns ſhe has to pay. On the contrary, if France is creditor, for a certain number of gros, the leſs number of gros there are in a crown, the more crowns ſhe will receive. The ſtate loſes alſo as buyer; for there muſt be the ſame number of gros, to buy the ſame quantity of merchandizes; and while the change is low, every French crown is worth fewer gros. For the ſame reaſon the ſtate gains as a ſeller:

* With the expence of carriage and inſurance deducted.

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ſeller: I ſell my merchandize in Holland for a certain number of gros; I receive then more crowns in France, when for every fifty gros I receive a crown, than I ſhould do if I received only the ſame crown for every fifty-four. The contrary to this takes place in the other ſtate. If the Dutch are indebted a certain number of crowns to France, they will gain; if they are owing to them, they will loſe; if they ſell they loſe, and if they buy they gain.

It is proper to purſue this ſomething farther. When the exchange is below par; for example, if it is at fifty inſtead of fifty-four, it ſhould follow that France on ſending bills of exchange to Holland for fifty-four thouſand crowns, could buy merchandizes only to the value of fifty thouſand; and that on the other hand, the Dutch ſending the value of fifty thouſand to France, might buy fifty-four thouſand, which makes a difference of $\frac{8}{54}$; that is, a loſs to France of more than $\frac{1}{7}$; ſo that France would be obliged to ſend to Holland $\frac{1}{7}$ more in ſpecie or merchandize, than ſhe would do was the exchange at par. And as the miſchief muſt conſtantly increaſe, becauſe a debt of this kind would bring the exchange ſtill lower, France would in the end be ruined. It ſeems, I ſay, as if this ſhould certainly follow; and yet it does not, becauſe of the principle which I have (a) elſewhere eſtabliſhed, which is, that ſtates conſtantly lean towards a balance, in order to preſerve their independency. Thus they borrow only in proportion to their ability to pay, and meaſure their buying by what they ſell: and taking the example from above, if the exchange falls in France from fifty-four to fifty, the Dutch who buy merchandizes in France to the value of a thouſand crowns, for which they uſed to pay fifty-four thouſand gros, would now pay only fifty thouſand, if the French would conſent to it. But the merchandize of France will riſe inſenſibly, and the profit will be ſhared between the French and the Dutch; for when a merchant

(a) See Book xx. Chap. 21.

chant can gain, he eaſily ſhares his profit: there then ariſes a communication of profit between the French and the Dutch. In the ſame manner the French, who bought merchandizes of Holland for fifty-thouſand gros, and who when the exchange was at fifty-four paid for them a thouſand crowns, will be obliged to add $\frac{4}{54}$ more in French crowns to buy the ſame merchandizes. But the French merchant being ſenſible of the loſs he ſuffers, will take up leſs of the merchandize of Holland. The French and the Dutch merchant will then be both loſers, the ſtate will inſenſibly fall into a balance, and the lowering of the exchange will not be attended with thoſe inconveniencies which we had reaſon to fear.

A merchant may ſend his ſtock into a foreign country when the exchange is below par, without injuring his fortune; becauſe when it returns, he recovers what he had loſt; but a prince, who ſends only ſpecie into a foreign country, which never can return, is always a loſer.

When the merchants have great dealings in any country, the exchange there infallibly riſes. This proceeds from their entering into many engagements, buying great quantities of merchandizes, and drawing upon foreign countries to pay for them.

A prince may amaſs great wealth in his dominions, and yet ſpecie may be really ſcarce and relatively common; for inſtance, this ſtate is indebted for many merchandizes to a foreign country, the exchange will be low tho' ſpecie be ſcarce.

The exchange of all places conſtantly tends to a certain proportion, and that in the very nature of things. If the courſe of exchange from Ireland to England is below par, and that of England to Holland is alſo under par, that of Ireland to Holland will be ſtill lower; that is, in a compound ratio of that of Ireland to England, and that of England to Holland: for a Dutch merchant who can have his ſpecie indirectly from Ireland, by the way

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way of England, will not chuſe to pay dearer by having it the direct way. This, I ſay, ought naturally to be the caſe: but however it is not exactly ſo; there are always circumſtances which vary theſe things; and the different profit of drawing by one place, or of drawing by another, conſtitutes the particular art and dexterity of the bankers, which does not belong to the preſent ſubject.

When a ſtate raiſes its ſpecie; for inſtance, when it gives the name of ſix livres or two crowns, to what was before called three livres or one crown, this new denomination, which adds nothing real to the crown, ought not to procure a ſingle gros more by the exchange. We ought only to have for the two new crowns, the ſame number of gros which we before received for the old one. If this does not happen, it muſt not be imputed as an effect of the regulation itſelf; but to the novelty and ſuddenneſs of the affair. The exchange adheres to what is already eſtabliſhed, and is not altered till after a certain time.

When a ſtate, inſtead of only raiſing the ſpecie by a law, calls it in, in order to diminiſh its ſize, it frequently happens that during the time taken up in its paſſing again through the mint, there are two kinds of money; the large, which is the old, and the ſmall, which is the new; and as the large is cried down, as not to be received as money, and bills of exchange muſt conſequently be paid in the new, one would imagine then that the exchange ſhould be regulated by the new. If, for example, in France the ancient crown of three livres, being worth in Holland ſixty gros, was reduced one half, the new crown ought to be valued only at thirty. On the other hand, it ſeems as if the exchange ought to be regulated by the old coin; becauſe the banker who has ſpecie, and receives bills, is obliged to carry the old coin to the mint, in order to change it for the new; by which he muſt be a loſer. The

exchange

exchange then ought to be fixed between the value of the old coin, and that of the new. The value of the old is decreaſed, if we may call it ſo, both becauſe there is already ſome of the new in trade, and becauſe the bankers cannot keep up to the rigour of the law; having an intereſt in letting looſe the old coin from their cheſts, and being even ſometimes forced to make payments with it. Again, the value of the new ſpecie muſt riſe; becauſe the banker having this, finds himſelf in a ſituation, in which, as we ſhall immediately prove, he will reap great advantage by procuring the old. The exchange ſhould then be fixed, as I have already ſaid, between the new and the old coin. For then the bankers find it for their intereſt, to ſend the old out of the kingdom; becauſe by this means they procure the ſame advantage as they could receive from a regular exchange of the old ſpecie, that is a great many gros in Holland, and in return a regular exchange a little lower, between the old and the new ſpecie, which would bring many crowns to France.

Suppoſe that three livres of the old coin yield by the actual exchange forty-five gros, and that by ſending this ſame crown to Holland they receive ſixty: but with a bill of forty-five gros, they procure a crown of three livres in France, which being ſent in the old ſpecie to Holland, ſtill yields ſixty gros: Thus all the old ſpecie would be ſent out of the kingdom, and the bankers would run away with the whole profit.

To remedy this, new meaſures muſt be taken. The government, which coined the new ſpecie, would itſelf be obliged to ſend great quantities of the old to the nation which regulates the exchange, and by thus gaining credit there raiſe the exchange pretty nearly to as many gros for a crown of three livres, as they could receive for ſending the old crown of three livres out of the country. I ſay, to nearly the ſame; for while the profits are ſmall, the bankers

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bankers will not be tempted to ſend it abroad, becauſe of the expence of carriage, and the danger of confiſcation.

It is fit that we ſhould give a very clear idea of this. Mr. Bernard, or any other banker employed by the ſtate, propoſes bills upon Holland, and gives them at one, two, or three gros higher than the actual exchange; he has made a proviſion in a foreign country by means of the old ſpecie which he has continually been ſending thither; and thus he has raiſed the exchange to the point we have juſt mentioned. In the mean time, by diſpoſing of his bills, he ſeizes on all the new ſpecie, and obliges the other bankers who have payments to make, to carry their old ſpecie to the mint; and, as he inſenſibly obtains all the ſpecie, he obliges the other bankers to give him bills of exchange at a very high price. By this means, his profit in the end compenſates in a great meaſure for the loſs he ſuffered at the beginning.

It is evident, that during theſe tranſactions, the ſtate muſt be in a dangerous criſis. Specie muſt become extremely ſcarce, 1. becauſe much the greateſt part is cried down: 2. becauſe a part will be ſent into foreign countries: 3. becauſe every one will lay it up, as not being willing to give that profit to the prince, which he hopes to receive himſelf. It is dangerous to do it ſlowly; and dangerous alſo, to do it in too much haſte. If the ſuppoſed gain be immoderate, the inconveniences increaſe in proportion.

We ſee, from what has been already ſaid, that when the exchange is lower than the ſpecie, a profit may be made by ſending it abroad; for the ſame reaſon, when it is higher than the ſpecie, there is a profit in cauſing it to return.

But there is a caſe in which profit may be made by ſending the ſpecie out of the kingdom, when the exchange is at par; that is, by ſending it into a foreign

foreign country to be coined over again. When it returns, an advantage may be made of it, whether it be circulated in the country, or paid for foreign bills.

Suppoſe a company has been erected in a ſtate with a prodigious ſtock, and this ſtock has in a few months been raiſed twenty or twenty-five times above the original purchaſe: ſuppoſe again, the ſame ſtate eſtabliſhed a bank, whoſe bills were to perform the office of ſpecie, while the numerary value of theſe bills was prodigious in order to anſwer to the numerary value of the ſtocks, (this is Mr. Law's ſyſtem) it would follow from the nature of things, that theſe ſtocks and theſe bills would vaniſh in the ſame manner as they aroſe. Stocks cannot ſuddenly be raiſed twenty or twenty-five times above their original value, without giving a number of people the means of procuring immenſe riches in paper: every one would ſeek to ſecure his fortune, and as the exchange offers the moſt eaſy way of removing it from home, or conveying it whither one pleaſes, people would inceſſantly remit a part of their effects to the nation that regulates the exchange. A project for making continual remittances into a foreign country, muſt lower the exchange. Let us ſuppoſe, that at the time of the ſyſtem, in proportion to the ſtandard and weight of the ſilver coin the exchange was fixed at forty-four gros to the crown; when a vaſt quantity of paper became money, they were unwilling to give more than thirty-nine gros for a crown, and afterwards thirty-eight, thirty-ſeven, *&c.* This proceeded ſo far, that after a while they would give but eight gros, and at laſt there was no exchange at all.

The exchange ought in this caſe to have regulated the proportion between the ſpecie and the paper of France. I ſuppoſe that by the weight and ſtandard of the ſilver, the crown of three livres in ſilver was worth forty gros, and that the exchange being made in paper, the crown of three livres in paper

was

Book XXII. Chap. 11.

was worth only eight gros, the difference was four fifths. The crown of three livres in paper was then worth four fifths leſs than the crown of three livres in ſilver.

CHAP. XI.

On the proceedings of the Romans *with reſpect to money.*

HOW great ſoever the exertion of authority has been in our times, with reſpect to the ſpecie of France during the adminiſtration of two ſucceſſive miniſters, ſtill it was vaſtly exceeded by the Romans; not at the time when corruption had crept into this republic, nor when it was in a ſtate of anarchy; but when the Romans were as much by their wiſdom as their courage, in the full vigour of the conſtitution, after having conquered the cities of Italy, and at the very time that they diſputed the empire with the Carthaginians.

And very glad I am, that I can now dive a little into this matter, that no example may be taken from what can never juſtly be called one.

(a) Pliny's *Natural Hiſtory*, L. xxxiii. Art. 13.

In the firſt Punic war, the (a) *As*, which ought to be twelve ounces of copper, weighed only two, and in the ſecond it was no more than one. This retrenchment anſwers to what we now call the raiſing of coin. To take half the ſilver from a crown of ſix livres, in order to make two crowns, or to raiſe it to the value of twelve livres, is preciſely the ſame thing.

They have left us no monument of the manner in which the Romans conducted this affair in the firſt Punic war; but what they did in the ſecond, is a proof of the moſt conſummate wiſdom. The republic found herſelf under an impoſſibility of paying her debts; the As weighed two ounces of copper, and the Denarius valued at ten Aſes, weighed twenty ounces of copper. The republic being willing

ling to gain half on her creditors, made the As (a) of an ounce of copper, and by this means paid the value of a Denarius with ten ounces. This proceeding muſt give a great ſhock to the ſtate; they were obliged therefore to break the force of it, as well as they could. It was in itſelf unjuſt, and it was neceſſary to render it as little ſo as poſſible. They had in view the deliverance of the republic, with reſpect to the citizens; they were not therefore obliged to direct their view to the deliverance of the citizens, with reſpect to each other. This made a ſecond ſtep neceſſary. It was ordained, that the denarius which hitherto contained but ten aſes, ſhould contain ſixteen. The reſult of this double operation was, that while the creditors of the republic loſt one half *, thoſe of individuals loſt only a fifth †; the price of merchandizes was increaſed only a fifth; the real change of the money was only a fifth. The other conſequences are obvious.

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(a) Pliny, ibid.

The Romans then, conducted themſelves with greater prudence than we, who in our tranſactions involved both the public treaſures, and the fortunes of individuals. But this is not all; their affair was carried on amidſt more favourable circumſtances than ours.

CHAP. XII.

The circumſtances in which the Romans *changed the value of their ſpecie.*

THERE was formerly very little gold and ſilver in Italy. This country has few or no mines of gold or ſilver. When Rome was taken by the Gauls, they found only a thouſand (b) weight of gold. And yet the Romans had ſacked many powerful cities, and brought home their wealth.

(b) Pliny, L. xxxiii. Art. 5.

For

* They received ten ounces of copper for twenty.

† They received ſixteen ounces of copper for twenty.

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For a long time they made uſe of none but copper money; and it was not till after the peace with Pyrrhus, that they had ſilver enough to make (a) money: they made denarii of this metal of the value of ten aſes *, or ten pounds of copper. At that time the proportion of ſilver was to that of copper, as 1 to 960. For as the Roman denarius was valued at ten aſes, or ten pounds of copper, it was worth one hundred and twenty ounces of copper; and the ſame denarius was valued at only one eighth of an ounce of ſilver †: this produced the above proportion.

(a) Freinſhemius, Lib. v. of the 2d Decad.

When Rome became miſtreſs of that part of Italy which is neareſt to Greece and Sicily, by degrees ſhe found herſelf between two rich nations, the Greeks and the Carthaginians. Silver increaſed at Rome; and as the proportion of 1 to 960 between ſilver and copper could be no longer ſupported, ſhe made ſeveral regulations with reſpect to money, which to us are unknown. However, at the beginning of the ſecond Punic war, the (b) Roman denarius was worth no more than twenty ounces of copper; and thus the proportion between ſilver and copper was no longer but as 1 to 160. The reduction was very conſiderable, ſince the republic gained five ſixths upon all copper money. But ſhe did only what was neceſſary in the nature of things, by eſtabliſhing the proportion between the metals made uſe of as money.

(b) Pliny's Nat. Hiſt. L. xxxiii. Art. 13.

The peace which terminated the firſt Punic war, left the Romans maſters of Sicily. They ſoon entered Sardinia; afterwards they began to know Spain; and thus the quantity of ſilver increaſed at Rome. They took meaſures to reduce the (c) denarius from twenty ounces of ſilver to ſixteen, which had

(c) Ibid.

* Freinſhemius, lib. v. Decad. 2. They ſtruck alſo, ſays the ſame author, half-denarii called quinarii, and quarters called ſeſterces.

† An eighth according to Budeus; according to other authors, a ſeventh.

had the effect of putting a nearer proportion between the ſilver and copper; by this means the proportion which was before as 1 to 160, was now made as 1 to 128. Book XXII. Chap. 13.

CHAP. XIII.

Proceedings with reſpect to money in the time of the emperors.

IN the changes made in the ſpecie during the time of the republic, they proceeded by diminiſhing it: the ſtate repoſed in the people the knowledge of its wants, and did not pretend to deceive them. Under the emperors they proceeded by way of allay. Theſe princes reduced to deſpair, even by their liberalities, found themſelves obliged to degrade the ſpecie; an indirect method, which diminiſhed the evil, without ſeeming to touch it. They withheld a part of the gift, and yet concealed the hand that did it; and, without ſpeaking of the diminution of the pay, or of the gratuity, it was found diminiſhed.

We even ſtill ſee (a) in cabinets a kind of medals, which are called plated; and are only pieces of copper covered with a thin plate of ſilver. This money is mentioned in a fragment of the 77th book of Dion (b).

Didius-Julian firſt began to debaſe it. We find that the coin of * Caracalla had an allay of more than half; that of Alexander Severus (c), of two thirds: the debaſing ſtill increaſed, till under Gallienus (d), nothing was to be ſeen but copper ſilver'd over.

It is evident, that ſuch violent proceedings could not take place in the preſent age; a prince might deceive himſelf, but he could deceive nobody elſe. The exchange has taught the banker, to draw a

(a) See Father Joubert's *Science of Medals*, Paris edit. of 1739. pag. 59.

(b) Extract of Virtues and Vices.

(c) See Savotte, ibid.

(d) Ibid.

* See *Savotte*, part 2. chap. 12. and *Le Journal des Sçavans* of the 28th of July, 1681. on a diſcovery of fifty thouſand medals.

Book XXII. Chap. 14.

compariſon between all the money in the world, and to eſtabliſh its juſt value. The ſtandard of money can no longer be a ſecret. Were the prince to begin to allay his ſilver, every body elſe would continue it and do it for him; the ſpecie of the true ſtandard would go abroad firſt, and nothing would be ſent back but baſe metal. If, like the Roman emperors, he debaſed the ſilver, without debaſing the gold, the gold would ſuddenly diſappear, and he would be reduced to his bad ſilver. The exchange, as I have ſaid in the preceding book (*), has deprived princes of the opportunity of ſhewing great exertions of authority, or at leaſt has render'd them ineffectual.

(*) Ch. 16.

CHAP. XIV.

How the exchange is a conſtraint on deſpotic power.

MUSCOVY would have deſcended from its deſpotic power, but could not. The eſtabliſhment of commerce depended on that of the exchange, and the tranſactions of exchange were inconſiſtent with all its laws.

In 1745, the Czarina made a law to expel the Jews, becauſe they remitted into foreign countries the ſpecie of thoſe who were baniſhed into Siberia, as well as that of the foreigners entertained in her ſervice. As all the ſubjects of the empire are ſlaves, they can neither go abroad themſelves, nor ſend away their effects without permiſſion. The exchange which gives them the means of remitting their ſpecie from one country to another, is therefore entirely incompatible with the laws of Muſcovy.

Commerce itſelf is inconſiſtent with the Ruſſian laws. The people are only compoſed of ſlaves employed in agriculture, and of ſlaves called eccleſiaſtics or gentlemen, becauſe they are the lords of thoſe ſlaves: there is then nobody left for the third eſtate, which ought to be compoſed of mechanics and merchants.

CHAP.

CHAP. XV.

The practice of some countries in Italy.

THEY have made laws in some parts of Italy to prevent subjects from selling their lands, in order to remove their specie into foreign countries. These laws may be good, when the riches of a state are so connected with the country itself, that there would be great difficulty in transferring them to another. But since, by the course of exchange, riches are in some degree independent on any particular state, and since they may with so much ease be conveyed from one country to another; that must be a bad law which will not permit persons for their own interest to dispose of their lands, while they can dispose of their money. It is a bad law, because it gives an advantage to moveable effects, in prejudice to the land; because it deters strangers from settling in the country, and, in short, because it may be eluded.

Book XXII. Chap. 15, & 16.

CHAP. XVI.

The assistance a state may derive from bankers.

THE bankers business is to change, not to lend money. If the prince makes use of them to exchange his specie, as he never does it but in great affairs, the least profit he can give for the remittance, becomes considerable; and if they demand large profits, we may be certain that there is a fault in the administration. On the contrary, when they are employed to advance specie, their art consists in procuring the greatest profit for the use of it, without being liable to be charged with usury.

CHAP. XVII.
Of public debts.

Book XXII. Chap. 17.

SOME have imagined that it was for the advantage of a ſtate to be indebted to itſelf: they thought that this multiplied riches by increaſing the circulation.

Thoſe who are of this opinion have, I believe, confounded a circulating paper which repreſents money, or a circulating paper which is the ſign of the profits that a company has, or will make by commerce, with a paper which repreſents a debt. The two firſt are extremely advantageous to the ſtate: the laſt can never be ſo; and all that we can expect from it is, that individuals have a good ſecurity for their payment. But let us ſee the inconveniencies which reſult from it.

1. If foreigners poſſeſs much paper which repreſents a debt, they annually draw out of the nation a conſiderable ſum for intereſt.

2. A nation that is thus perpetually in debt, ought to have the exchange very low.

3. The taxes raiſed for the payment of the intereſt of the debt, are a hurt to the manufactures, by raiſing the price of the artificers labour.

4. It takes the true revenue of the ſtate from thoſe who have activity and induſtry, to convey it to the indolent, that is, it gives the materials for labour to thoſe who do not labour, and clogs with difficulties the induſtrious artiſt.

Theſe are its inconveniencies: I know of no advantages. Ten perſons have each a yearly income of a thouſand crowns, either in land or trade; this raiſes to the nation at five *per cent.* a capital of two hundred thouſand crowns. If theſe ten perſons employed the half of their income, that is five thouſand crowns, in paying the intereſt of an hundred thouſand crowns which they had borrowed of others, that would

would be only to the ſtate as two hundred thouſand crowns; that is, in the language of the Algebraiſts, 200,000 crowns — 100,000 crowns + 100,000 crowns = 200,000 crowns.

People are thrown perhaps into this error, by reflecting that the paper which repreſents the debt of a nation is the ſign of riches; for none but a rich ſtate can ſupport ſuch paper without falling into decay. And if it does not fall, it is a proof that the ſtate has other riches beſides. They ſay, that it is not an evil, becauſe there are reſources againſt it, and that it is an advantage, becauſe theſe reſources ſurpaſs the evil.

CHAP. XVIII.

Of the payment of public debts.

IT is neceſſary, that there ſhould be a proportion between the ſtate as creditor, and the ſtate as debtor. The ſtate may be a creditor to infinity, but it can only be a debtor to a certain degree, and when it ſurpaſſes that degree the title of creditor vaniſhes.

If the credit of the ſtate has never received the leaſt blemiſh, it may do what has been ſo happily practiſed in one of the kingdoms (a) of Europe; that is, it may acquire a great quantity of ſpecie, and offer to reimburſe every individual, at leaſt if they will not reduce their intereſt. When the ſtate borrows, the individuals fix the intereſt; when it pays, the intereſt for the future is fixed by the ſtate.

(a) England.

It is not ſufficient to reduce the intereſt: it is neceſſary to erect a ſinking fund from the advantage of the reduction, in order to pay every year a part of the capital: a proceeding ſo happy, that its ſucceſs increaſes every day.

When the credit of the ſtate is not intire, there is a new reaſon for endeavouring to form a ſinking fund, becauſe this fund being once eſtabliſhed, will ſoon procure the public confidence.

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If the ſtate is a republic, the government of which is in its own nature conſiſtent with its entering into projects of a long duration, the capital of the ſinking fund may be very inconſiderable: but it is neceſſary in a monarchy for the capital to be much greater.

2. The regulations ought to be ſo ordered, that all the ſubjects of the ſtate may ſupport the weight of the eſtabliſhment of theſe funds, becauſe they have all the weight of the eſtabliſhment of the debt; thus the creditor of the ſtate by the ſums he contributes, pays himſelf.

3. There are four claſſes of men, who pay the debts of the ſtate: the proprietors of the land, thoſe engaged in trade, the labourers and artificers, and in fine, the annuitants either of the ſtate or of private people. Of theſe four claſſes the laſt, in a caſe of neceſſity one would imagine, ought leaſt to be ſpared: becauſe it is a claſs intirely paſſive, while the ſtate is ſupported by the active vigour of the other three. But as it cannot be higher taxed without deſtroying the public confidence, of which the ſtate in general and theſe three claſſes in particular, have the utmoſt need; as a breach in the public faith cannot be made on a certain number of ſubjects, without ſeeming to be made on all; as the claſs of creditors is always the moſt expoſed to the projects of miniſters, and always in their eye, and under their immediate inſpection, the ſtate is obliged to give them a ſingular protection, that the part which is indebted may never have the leaſt advantage over that which is the creditor.

CHAP. XIX.

Of lending upon intereſt.

SPecie is the ſign of value. It is evident, that he who has occaſion for this ſign ought to pay for the uſe of it, as well as for every thing elſe that he has

has occaſion for. All the difference is, that other things may be either hired or bought; whilſt money, which is the price of things, can only be hired, and not bought*.

To lend money without intereſt, is certainly an action laudable and extremely good; but 'tis obvious, that it is only a counſel of religion, and not a civil law.

In order that trade may be ſucceſsfully carried on, it is neceſſary that a price be fixed on the uſe of ſpecie; but this price ſhould be very inconſiderable. If it be too high, the merchant who ſees that it will coſt him more in intereſt than he can gain by commerce, will undertake nothing: if there is no conſideration to be paid for the uſe of ſpecie, no body will lend it; and here too the merchant will undertake nothing.

I am miſtaken, when I ſay that no body will lend; the affairs of ſociety muſt ever make it neceſſary. Uſury will be eſtabliſhed; but with all the diſorders with which it has been conſtantly attended.

The laws of Mahomet confound uſury with lending upon intereſt. Uſury increaſes in Mahometan countries, in proportion to the ſeverity of the prohibition. The lender indemnifies himſelf for the danger he undergoes of ſuffering the penalty.

In thoſe eaſtern countries, the greateſt part of the people are ſecure of nothing; there is hardly any proportion between the actual poſſeſſion of a ſum, and the hope of receiving it again after having lent it: uſury then muſt be raiſed in proportion to the danger of inſolvency.

* We ſpeak not here of gold and ſilver conſidered as a merchandize.

CHAP.

CHAP. XX.
Of maritime uſury.

Book XXII. Chap. 20. &21.

THE greatneſs of maritime uſury is founded on two things: the danger of the ſea, which makes it proper that thoſe who expoſe their ſpecie, ſhould not do it, without conſiderable advantage; and the eaſe with which the borrower by the means of commerce ſpeedily accompliſhes a variety of great affairs. But uſury, with reſpect to land-men, not being founded on either of theſe two reaſons, is either prohibited by the legiſlators, or, what is more rational, reduced to proper bounds.

CHAP. XXI.
Of lending by contract, and the ſtate of uſury amongſt the Romans.

BEſides the loans made for the advantage of commerce, there is ſtill a kind of lending by a civil contract, from whence reſults intereſt or uſury.

As the people of Rome increaſed every day in power, the magiſtrates ſought to inſinuate themſelves into their favour by enacting ſuch laws as were moſt agreeable to them. They retrenched capitals; firſt lowered, and at length prohibited intereſt; and took away the power of confining the debtor's body: in fine, the abolition of debts was contended for, whenever a tribune was diſpoſed to render himſelf popular.

Theſe continual changes, whether made by the laws, or by the Plebiſcita, naturaliſed uſury at Rome: for the creditors ſeeing the people their debtor, their legiſlator, and their judge, had no longer any confidence in their agreements; the people, like a debtor who has loſt his credit, could only tempt them to lend by allowing an exorbitant intereſt; for if the laws did not from time to time remedy the evil, the complaints

complaints of the people became continual, and conſtantly intimidated the creditors. This was the cauſe that all honeſt means of borrowing and lending were aboliſhed at Rome, and that the moſt monſtrous uſury eſtabliſhed ( ) itſelf in that city, notwithſtanding the ſtrict prohibition and ſeverity of the law. Book XXII. Chap. 22.

(a) Tacit. Annal. Lib. vi.

Cicero tells us, that in his time intereſt at Rome was at thirty four *per cent.* and in the (') provinces at forty-eight. This evil was a conſequence of the ſeverity of the laws againſt uſury. Laws exceſſively good are the ſource of exceſſive evil. The borrower found himſelf under a neceſſity of paying for the intereſt of the money, and for the danger the creditor underwent of ſuffering the penalty of the law.

(') Letters to Atticus, Lib. v. Let. 21.

CHAP. XXII.

The ſame ſubject continued.

THE firſt Romans had not any laws to regulate the rate of uſury *. In the conteſts which aroſe on this ſubject between the Plebeians and the Patricians, even in the † ſedition on the *Mons ſacer*, nothing was alledged on the one hand but juſtice, and on the other the ſeverity of contracts.

They then only followed private agreements, which I believe were moſt commonly at twelve *per cent. per annum.* My reaſon is, that in the § ancient language of the Romans, intereſt at ſix *per cent.* was called half uſury, and intereſt at three *per cent.* quarter uſury. Total uſury muſt therefore have been intereſt at twelve *per cent.*

But if it be aſked, how ſuch great intereſt could be eſtabliſhed amongſt a people almoſt without commerce? I anſwer, that this people, being very often

* Uſury and intereſt amongſt the Romans ſignified the ſame thing.

† See Dionyſius Halic. who has deſcribed it ſo well.

§ *Uſuræ ſemiſſes, trientes, quadrantes.* See the ſeveral titles of the digeſts and codes on uſury, and eſpecially the 17th law, with the note *ff. de Uſuris.*

Book XXII. Chap. 22.

ten obliged to go to war without pay, were under a frequent neceſſity of borrowing; and as they inceſſantly made happy expeditions, they were commonly very able to pay: and this is viſible from the recital of the conteſts which aroſe on this ſubject; they did not then diſagree concerning the avarice of creditors, but ſaid that thoſe who complained might have been able to pay, had they lived in a more * regular manner.

They then made laws, which had only an influence on the preſent ſituation of affairs: they ordained, for inſtance, that thoſe who enrolled themſelves for the war they were engaged in, ſhould not be moleſted by their creditors; that thoſe who were in priſon, ſhould be ſet at liberty; that the moſt indigent, ſhould be ſent into the colonies; and ſometimes they opened the public treaſury. The people, being eaſed of their preſent burthens, became appeaſed; and as they required nothing for the future, the ſenate were far from providing againſt it.

At the time when the ſenate maintained the cauſe of uſury with ſo much conſtancy, the Romans were diſtinguiſhed by an extreme love of frugality, poverty, and moderation: but the conſtitution was ſuch, that the principal citizens alone ſupported all the expences of government, while the common people payed nothing. What an expedient, to deprive the former of the liberty of purſuing their debtors, to oblige them to execute their offices, and to ſupport the republic amidſt its moſt preſſing neceſſities!

Tacitus ſays, that the law of the twelve tables fixed the intereſt at one *per cent.* It is evident that he was miſtaken, and that he took another law, of which I am going to ſpeak, for the law of the twelve tables. If this had been regulated in the law of the twelve tables, why did they not make uſe of its authority in the diſputes which afterwards aroſe between

* See Appius's ſpeech on this ſubject in Dionyſius Halicarnaſſeus.

tween the creditors and debtors? We find not any veſtige of this law upon lending at intereſt; and let us have but ever ſo little knowledge of the hiſtory of Rome, we ſhall ſee that a law like this could never be the work of the decemvirs.

The Licinian law, made (a) eighty-five years after the law of the twelve tables, was one of thoſe temporary laws of which we have ſpoken. It ordained, that what had been paid for intereſt ſhould be deducted from the principal, and the reſt diſcharged by three equal payments.

(a) In the year of Rome 388. Tit. Liv. Lib. vi.

In the year of Rome 398, the tribunes Duellius and Menenius cauſed a law to be paſſed, which reduced the intereſt to (b) one *per cent. per annum*. 'Tis this law which Tacitus (c) confounds with the law of the twelve tables, and this was the firſt ever made by the Romans to fix the rate of intereſt. Ten years after *, this uſury was reduced one half (d); and in the end intirely aboliſhed (e); and if we may believe ſome authors whom Livy had read, this was under the conſulate of † C. Martius Rutilius, and P. Servilius, in the year of Rome 413.

(b) *Untiaria uſura.* Tit. Liv. Lib. vii.

(c) Annal. Lib. vi.

(d) *Semiunciaria uſura.*

It fared with this law as with all thoſe in which the legiſlator carries things to exceſs; an infinite number of ways were found to elude it. They enacted therefore many others to confirm, correct, and temper it. Sometimes they quitted ‖ the laws to follow the common practice, at others the common practice to follow the laws; but in this caſe, cuſtom eaſily prevailed. When a man wanted to borrow, he found an obſtacle in the very law made in his favour; this law muſt be evaded by the perſon it was made to ſuccour, and by the perſon it condemned.

(e) As Tacitus ſays, Annal. Lib. vi.

Sempronius

* Under the conſulate of L. Manlius Torquatus, and C. Plautius, according to. T. Liv. Lib. vii. This is the law mentioned by Tacitus, Annal. Lib. vi.

† This law was paſſed at the inſtance of M. Genucius, tribune of the people. *Tit. Liv. Lib.* vii. towards the end.

‖ *Veteri jam more fœnus receptum erat.* Appian, on the Civil War, Lib. i.

BOOK XXII. Chap. 22.

Sempronius Aſellus, the prætor, having permitted the * debtors to act in conformity to the laws, was (a) ſlain by the creditors for attempting to revive the memory of a ſeverity that could no longer be ſupported.

(a) In the year of Rome 663.

Under Sylla, L. Valerius Flaccus made a law, which ſuffered intereſt to be at three *per cent. per annum.* This law the moſt moderate, the moſt equitable ever made on this account by the Romans, is diſapproved by Paterculus †. But if this law was neceſſary for the advantage of the republic, if it was of ſervice to every individual, if it formed an eaſy communication between the debtor and the creditor, it could not be unjuſt.

(b) Leg. xii. ff. *de verb. ſignif.*

He pays leaſt, ſays Ulpian (b), who pays lateſt. This decides the queſtion whether intereſt be lawful; that is, whether the creditor can ſell time, and the debtor buy it.

* *Permiſit eos legibus agere.* Appian, on the Civil War, Lib. i. and the Epitome of Livy, Lib. lxxiv.

† *Turpiſſimæ legis autor qua creditoribus quadrantem ſolvi juſſerat* Lib ii. Some authors have interpreted this paſſage, as if the law of Flaccus had ordained, that they ſhould only pay a fourth of the principal; but, in my opinion, this was not the language of the Latin authors. When the queſtion was in relation to the reducing of debts, they made uſe of the words *quadrans, triens,* &c. to ſignify the uſury; and *tertia pars,* and *quarta pars,* to point out the capital. 2. They made the conſul Valerius the author of a law, which would ſcarcely have been made by a ſeditious tribune. 3. This was in the heat of a civil war, at a time when it was neceſſary to maintain the public credit, not to deſtroy it; a civil war, in ſhort, that had no relation to the abolition of debts.

BOOK XXIII.

Of laws in the relation they bear to the number of Inhabitants.

CHAP. I.

Of men and animals with reſpect to the multiplication of their ſpecies.

Book XXIII. Chap. 1.

KIND Venus (a) glory of the beſt abodes
* * * * * * * *
When firſt the gentle ſpring begins t' inſpire
Melting thoughts, ſoft wiſhes, gay deſire,
And warm Favonius fans the amorous fire;
Firſt thro' the birds the active flame doth move,
Who, with their mates, ſit down, and ſing, and love;
They gratefully their tuneful voice employ,
At thy approach the author of their joy.
Each beaſt forgets his rage, and entertains
A ſofter fury thro' the flow'ry plains;
Thro' rapid ſtreams, thro' woods and ſilent groves,
With wanton play they run to meet their loves.
Whole nature yields unto your charms: the ways
You lead, ſhe follows, and eagerly obeys.
Acted by thoſe kind principles you infuſe,
Each bird and beaſt endeavours to produce
His kind, and the decaying world renews.

(a) Tranſlation of Lucretius, by Creech, Book I.

The females of brutes have an almoſt conſtant fecundity. But in the human ſpecies, the manner of thinking, the character, the paſſions, the humour, the caprice, the idea of preſerving beauty, the pain of child-bearing, and the fatigue of a too numerous family, obſtruct propagation a thouſand different ways.

CHAP.

CHAP. II.
Of marriage.

Book XXIII. Chap. 2.

THE natural obligation of the father to provide for his children has eſtabliſhed marriage, which makes known the perſon who ought to fulfil this obligation. The people (a) mentioned by Pomponius Mela (b) had no other way of diſcovering him but by reſemblance.

(a) The Garamantes.

(b) Lib. i. Cap. 8.

Among regular policied nations the father* is that perſon on whom the laws, by the ceremony of marriage, have fixed this duty; becauſe they find in him the man they want.

Amongſt brutes this is an obligation which the mother can generally perform; but it is much more extenſive amongſt men. Their children indeed have reaſon; but it comes only by ſlow degrees. It is not ſufficient to nouriſh them; we muſt alſo direct them: they can already live; but they cannot govern themſelves.

Illicit conjunctions contribute but little to the propagation of the ſpecies. The father who is under a natural obligation to nouriſh and educate his children, is not then fixed; and the mother, with whom the obligation remains, finds a thouſand obſtacles from ſhame, remorſe, the conſtraint of her ſex, and the rigour of laws; and beſides, ſhe generally wants the means.

Women, who have ſubmitted to a public proſtitution, cannot have the conveniency of educating their children: the trouble of education is incompatible with their ſtation; and they are ſo corrupt, that they can have no protection from the law.

It follows from all this, that public continence is naturally connected with the propagation of the ſpecies.

CHAP.

* *Pater eſt quem nuptiæ demonſtrant.*

CHAP. III.
Of the condition of children.

IT is a dictate of reaſon, that when there is a marriage, children ſhould follow the ſtation or condition of the father; and that when there is not, they can belong to the mother only*. Book XXIII. Chap. 3. 4. & 5.

CHAP. IV.
Of families.

IT is almoſt every where a cuſtom for the wife to paſs into the family of the husband. The contrary is without any inconveniency eſtabliſhed at Formoſa (a), where the husband enters into the family of the wife.

(a) Du Halde, Tom. I. Pag. 165.

This law, which fixes the family in a ſucceſſion of perſons of the ſame ſex, greatly contributes, independently of the firſt motives, to the propagation of the human ſpecies. The family is a kind of property: a man who has children of a ſex which does not perpetuate it, is never ſatisfied if he has not thoſe who can render it perpetual.

Names, which give men an idea of a thing, which one would imagine ought not to periſh, are extremely proper to inſpire every family with a deſire of extending its duration. There are people, amongſt whom names diſtinguiſh families: there are others, where they only diſtinguiſh perſons: theſe laſt have not the ſame advantage as the former.

CHAP. V.
Of the ſeveral orders of lawful wives.

LAWS and religion ſometimes eſtabliſh many kinds of civil conjunctions: and this is the caſe amongſt

* For this reaſon among nations that have ſlaves, the child almoſt always follows the ſtation or condition of the mother.

Book XXIII. Chap. 6.

amongſt the Mahometans, where there are ſeveral orders of wives, the children of whom are acknowledged by being born in the houſe, by civil contracts, or even by the ſlavery of the mother, and the ſubſequent gratitude of the father.

It would be contrary to reaſon, that the law ſhould ſtigmatize the children for what it approved in the father. All theſe children ought therefore to ſucceed, at leaſt if ſome particular reaſon does not oppoſe it, as in Japan; where none ſucceed but the children of the wife given by the emperor. Their policy demands that the gifts of the emperor ſhould not be too much divided, becauſe they ſubject them to a kind of ſervice, like that of our ancient fiefs.

CHAP. VI.

Of laws in relation to baſtards.

IN republics, where it is neceſſary that there ſhould be the pureſt morals, baſtards ought to be more degraded than in monarchies.

The laws made againſt them at Rome were perhaps too ſevere. But as the ancient inſtitutions laid all the citizens under a neceſſity of marrying; and as marriages were alſo ſoftened by the permiſſion to repudiate, or make a divorce; nothing but an extreme corruption of manners could lead them to concubinage.

'Tis obſervable, that as the quality of a citizen was a very conſiderable thing in a democratic government, where it carried with it the ſovereign power, they frequently made laws in reſpect to the ſtate of baſtards, which had leſs relation to the thing itſelf, and to the honeſty of marriage, than to the particular conſtitution of the republic. Thus the people have ſometimes admitted baſtards into the number of (a) citizens, in order to increaſe their power in oppoſition to the great. Thus the Athenians excluded baſtards from the privilege of being citizens,

(a) Ariſtotle's Politics, Lib. vi. Cap. 4.

citizens, that they might poſſeſs a greater ſhare of the corn ſent them by the king of Egypt. In fine, Ariſtotle informs us (a), that in many cities where there was not a ſufficient number of citizens, their baſtards ſucceeded to their poſſeſſions; and that when there was an adequate number, they did not ſucceed. Book XXIII. Chap. 7.

(a) Ibid. Lib. iii. Cap. 3.

CHAP. VII.

Of the father's conſent to marriage.

THE conſent of fathers is founded on their authority, that is, on their right of property. It is alſo founded on their love, on their reaſon, and on the uncertainty of that of their children, whom youth confines in a ſtate of ignorance, and paſſion in a ſtate of ebriety.

In the ſmall republics or ſingular inſtitutions already mentioned, they might have laws which gave to magiſtrates that right of inſpection over the marriages of the children of citizens, which nature had already given to fathers. The love of the public might there equal or ſurpaſs all other love. Thus Plato would have marriages regulated by the magiſtrates: this the Lacedemonian magiſtrates performed.

But in common inſtitutions, fathers have the diſpoſal of their children in marriage: their prudence in this reſpect, muſt always be ſuperior to the prudence of a ſtranger. Nature gives to fathers a deſire of procuring ſucceſſors to thoſe children, who ſcarcely think for themſelves. In the ſeveral degrees of progeniture, they ſee themſelves inſenſibly advancing to a kind of immortality. But what muſt be done if oppreſſion and avarice ariſe to ſuch an height as to uſurp all the authority of fathers? Let us hear what Thomas Gage (b) ſays in regard to the conduct of the Spaniards in the Indies.

(b) The Adventures of T. Gage, pag. 171.

"*In order to increaſe the number of men who pay*
"*tribute, they obliged all the Indians of fifteen years*

Book XXIII. Chap. 8. & 9.

"*of age to marry; they even regulated the time when* "*the Indians ſhould marry, to fourteen for the males,* "*and fifteen for the females. They ground this up-* "*on a canon, which ſays, that a forward under-* "*ſtanding may ſupply the immaturity of age.*" He ſaw a liſt of theſe taken. It was, ſays he, a moſt ſhameful affair. Thus in an action which ought to be the moſt free, the Indians are the greateſt ſlaves.

CHAP. VIII.

The ſame ſubject continued.

IN England, the law is frequently abuſed by the daughters marrying according to their own fancy, without conſulting their parents. This cuſtom is, I am apt to imagine, more tolerated there than any where elſe, from a conſideration, that as the laws have not eſtabliſhed a monaſtic celibacy, the daughters have no other ſtate to chuſe but that of marriage, and this they cannot refuſe. In France, on the contrary, young women have always the reſource of celibacy; and therefore the law which ordains that they ſhall wait for the conſent of their fathers, may be more agreeable. In this light the cuſtom of Italy and Spain muſt be leſs rational; convents are there eſtabliſhed, and yet they may marry, without the conſent of their fathers.

CHAP. IX.

Of young women.

YOUNG women who are conducted by marriage alone to liberty and pleaſure; who have a mind which dares not think, an heart which dares not feel, eyes which dare not ſee, ears which dare not hear, who appear only to ſhew themſelves ſilly, condemned without intermiſſion to trifles and precepts, have ſufficient inducements to lead them on

to

to marriage: it is the young men that want to be encouraged.

CHAP. X.

What it is that determines to marriage.

WHerever a place is found in which two perſons can live commodiouſly, there they enter into marriage. Nature has a ſufficient propenſity to it, when unreſtrained by the difficulty of ſubſiſtence.

A riſing people increaſe and multiply extremely. This is, becauſe with them it would be a great inconveniency to live in celibacy; and none to have many children. The contrary of which is the caſe when a nation is formed.

CHAP. XI.

Of the ſeverity of government.

MEN who have abſolutely nothing, ſuch as beggars, have many children. This proceeds from their being in the caſe of a riſing people: it coſts the father nothing to give his art to his offſpring, who even in their infancy are the inſtruments of this art. Theſe people multiply in a rich or ſuperſtitious country, becauſe they do not ſupport the burthen of ſociety; but are themſelves the burthen. But men who are poor, only becauſe they live under a ſevere government; who regard their lands leſs as the ſource of their ſubſiſtence, than as a cauſe of vexation; theſe men, I ſay, have few children: they have not even ſubſiſtence for themſelves, how then can they think of dividing it? they are unable to take care of themſelves when they are ſick, how then can they attend to the wants of creatures, whoſe infancy is a continual ſickneſs?

Some through a fluency of ſpeech and an incapacity of examining, have pretended to ſay, that the

Book XXIII. Chap. 12. & 13.

greater the poverty of the ſubjects, the more numerous are their families; that the more they are loaded with taxes, the more induſtriouſly they endeavour to put themſelves in a ſtation in which they will be able to pay them: two ſophiſms, which have always deſtroyed, and will for ever be the deſtruction of monarchies.

The ſeverity of government may be carried to ſuch an extreme, as to make the natural ſenſations deſtructive of the natural ſenſations themſelves. Would the women of (a) America have procured abortions, had their maſters been leſs cruel?

(a) The Adventures of T. Gage, pag. 58.

CHAP. XII.

Of the number of males and females in different countries.

(b) Book xvi. Chap. 4.

I Have already obſerved (b), that there are born in Europe rather more boys than girls. It has been remarked that in *Japan there are born rather more girls than boys: all things compared, there muſt be more fruitful women in Japan than in Europe, and conſequently it muſt be more populous.

(c) Collection of Voyages that contributed to the eſtabliſhment of the Eaſt India company. Vol. I. Pag. 347.

We are informed (c), that at Bantam there are ten girls to one boy. A diſproportion like this muſt cauſe the number of families there, to be to the number of thoſe of other climates, as 1 to $5\frac{1}{2}$; which is a prodigious difference. Their families may be much larger indeed; but there muſt be few men in circumſtances ſufficient to provide for ſo large a family.

CHAP. XIII.

Of ſea-port towns.

IN ſea-port towns, where men expoſe themſelves to a thouſand dangers, and go abroad to diſtant

* See Kempfer, who gives a computation of the people of Meaco.

distant climates, there are fewer men than women: and yet we see more children there than in other places. This proceeds from the great ease with which they procure the means of subsistence. Perhaps even the oily parts of fish are more proper to furnish that matter which contributes to generation. This may be one of the causes of the infinite number of people in * Japan and China †, where they live almost wholly on (a) fish. If this be the case, certain monastic rules, which oblige the monks to live on fish, must be contrary to the spirit of it's institution.

(a) See Duhalde, Tom. ii. P. 139—142. &c.

CHAP. XIV.

Of the productions of the earth which require a greater or a less number of men.

PAsture-lands are but little peopled, because they find employment only for a few. Corn-lands employ a great many men, and vineyards infinitely more.

It has been a frequent complaint in England §, that the increase of Pasture-land diminished the inhabitants; and it has been observed in France, that the prodigious number of vineyards is one of the great causes of the multitude of people.

Those countries where coal-pits furnish a proper substance for fuel, have this advantage over others, that not having the same occasion for forests, the lands may be cultivated.

* Japan is composed of a number of isles, where there are many banks, and the sea is there extremely full of fish.

† China abounds in rivers.

§ The greatest number of the proprietors of land, says Bishop Burnet, finding more profit in selling their wool than their corn, inclosed their estates: the commons ready to perish with hunger, rose up in arms; they insisted on a division of the lands: the young king even wrote on this subject. And proclamations were made against those who inclosed their lands. *Abridg. of the Hist. of the Reformation.*

Book XXIII. Chap. 15.

In countries productive of rice, they are at great pains in watering the land; a great number of men muſt therefore be employed. Beſides, there is leſs land required to furniſh ſubſiſtence for a family, than in thoſe which produce other kinds of grain. In fine, the land which is elſewhere employed in raiſing cattle, ſerves immediately for the ſubſiſtence of man; the labour, which in other places is performed by cattle, is there performed by men; ſo that the culture of the ſoil, becomes to man an immenſe manufacture.

CHAP. XV.

Of the number of inhabitants with relation to the arts.

WHERE there is an Agrarian law, and the lands are equally divided, the country may be extremely well peopled, though there are but few arts; becauſe every citizen receives from the cultivation of his land whatever is neceſſary for his ſubſiſtence, and all the citizens together conſume all the fruits of the earth. Thus it was in ſome eminent republics.

In our preſent ſituation, in which lands are ſo unequally diſtributed, they produce much more than thoſe who cultivate them can conſume; if the arts therefore ſhould be neglected, and nothing minded but agriculture, the country could not be peopled. Thoſe who cultivate, having corn to ſpare, nothing would engage them to work the following year; the fruits of the earth would not be conſumed by the indolent; for theſe would have nothing with which they could purchaſe them. It is neceſſary then that the arts ſhould be eſtabliſhed, in order that the produce of the land may be conſumed by the labourer and the artificer. In a word, it is now proper that many ſhould cultivate much more than is neceſſary for their own uſe. For this purpoſe, they muſt have a deſire

a desire of enjoying superfluities; and these they can receive only from the artificer. Book XXIII. Chap. 16.

Those machines which are designed to abridge man's labour, are not always useful. If a piece of workmanship is of a moderate price, such as is equally agreeable to the maker and the buyer, those machines which would render the manufacture more simple, or in other words, diminish the number of workmen, would be pernicious. And if water-mills were not every where established, I should not have believed them so useful as is pretended, because they have deprived an infinite multitude of their employment, a vast number of persons of the use of water, and great part of the land of its fertility.

CHAP. XVI.

The concern of the legislator in the propagation of the species.

REgulations concerning the number of citizens depend greatly on circumstances. There are countries, in which nature does all: the legislator then can do nothing. What need is there of inducing men by laws to propagation, when a fruitful climate yields a sufficient number of inhabitants? Sometimes the climate is more favourable than the soil; the people multiply, and are destroyed by famine: this is the case of China. Hence a father sells his daughters, and exposes his children. In Tonquin (a), the same causes produce the same effects; so we need not, like the Arabian travellers mentioned by Renaudot, search for the origin of this in their sentiments (b) on the Metempsychosis.

For the same reason, the religion of the isle of Formosa (c) does not suffer the women to bring their children into the world, till they are thirty-five years of age: the priestess before this age, by bruising the belly, procures abortion.

(a) Dampiere's Voyages, Vol. II. Pag. 41.
(b) Ibid. Pag. 167.
(c) See the Collection of Voyages that contributed to the establishment of the East-India company, Vol. I. part 1. pag. 182. & 188.

CHAP.

CHAP. XVII.

Of Greece, *and the number of its inhabitants.*

Book XXIII. Chap. 17.

THAT effect which in certain countries of the eaſt ſprings from phyſical cauſes, was produced in Greece by the nature of the government. The Greeks were a great nation, compoſed of cities, each of which had a diſtinct government and ſeparate laws. They had no more the ſpirit of conqueſt and ambition, than thoſe of Swiſſerland, Holland, and Germany, have at this day. In every republic the legiſlator had in view the happineſs of the citizens at home, and their power abroad, leſt it ſhould prove inferior * to that of the neighbouring cities. Thus, with the enjoyment of a ſmall territory and great happineſs, it was eaſy for the number of the citizens to increaſe to ſuch a degree as to become burthenſome. This obliged them inceſſantly to ſend out colonies; and as the Swiſs do now, to let their men out to war. Nothing was neglected that could hinder the too great multiplication of children.

They had amongſt them republics, whoſe conſtitution was very remarkable. The nations they had ſubdued, were obliged to provide ſubſiſtence for the citizens. The Lacedemonians were fed by the Helotes, the Cretans by the Periecians, and the Theſſalians by the Peneſtes. They were obliged to have only a certain number of freemen, that their ſlaves might be able to furniſh them with ſubſiſtence. 'Tis a received maxim in our days, that it is neceſſary to limit the number of regular troops: now the Lacedemonians were an army, maintained by the peaſants: it was proper therefore that this army ſhould be limited; without this the freemen, who had all the advantages of ſociety, would increaſe beyond number, and the labourers be overloaded.

The

* In valour, diſcipline, and military exerciſes.

The politics of the Greeks were particularly employed in regulating the number of citizens. Plato in his republic fixes them at five thouſand and forty, and he would have them ſtop or encourage propagation, as was moſt convenient, by honors, ſhame, and the advice of the old men; he would even (a) regulate the number of marriages, in ſuch a manner, that the republic might be recruited without being overcharged. BOOK XXIII. Chap. 17.

(a) Of Laws. Lib. v.

If the laws of a country, ſays Ariſtotle (b), forbid the expoſing of children, the number of thoſe brought forth ought to be limited. If they have more than the number preſcribed by law, he adviſes (c) to make the women miſcarry before the fœtus be formed.

(b) Polit. Lib. vii. Cap. 16.

(c) Ibid.

The ſame author mentions the infamous means made uſe of by the Cretans, to prevent their having too great a number of children; a proceeding too indecent to repeat.

There are places, ſays Ariſtotle (d) again, where the laws give baſtards the privilege of being citizens; but as ſoon as they have a ſufficient number of people, this privilege ceaſes. The ſavages of Canada burn their priſoners: but when they have empty cottages to give them, they receive them into their nation.

(d) Polit. Lib. iii. Cap. 3.

Sir William Petty, in his calculations, ſuppoſes that a man in England is worth what he would ſell for at Algiers *. This can be true only with reſpect to England. There are countries where a man is worth nothing, there are others where he is worth leſs than nothing.

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* Sixty pounds Sterling.

CHAP. XVIII.

Of the ſtate and number of people before the Romans.

Book XXIII. Chap 18. & 19.

ITALY, Sicily, Aſia Minor, Gaul and Germany, were nearly in the ſame ſtate as Greece: full of ſmall nations that abounded with inhabitants; they had no need of laws to increaſe their number.

CHAP. XIX.

Of the depopulation of the univerſe.

ALL theſe little republics were ſwallowed up in a large one, and the univerſe inſenſibly became depopulated: in order to be convinced of this we need only conſider the ſtate of Italy and Greece, before and after the victories of the Romans.

(a) Lib. vi. "*You will aſk me,* ſays Livy (a), *where the Volſci* "*could find ſoldiers to ſupport the war, after having* "*been ſo often defeated. There muſt have been for-*"*merly an infinite number of people in thoſe countries,* "*which at preſent would be little better than a deſart,* "*were it not for a few ſoldiers and Roman ſlaves.*"

"*The oracles have ceaſed,* ſays Plutarch, *becauſe* "*the places where they ſpoke are deſtroyed. At pre-*"*ſent we can ſcarcely find in Greece three thouſand* "*men fit to bear arms.*"

(b) Lib. vii. Pag. 496. "*I ſhall not deſcribe,* ſays Strabo (b), *Epirus, and* "*the adjacent places; becauſe theſe countries are in-*"*tirely deſerted. This depopulation, which began* "*long ago, ſtill continues; ſo that the Roman ſoldiers* "*encamp in the houſes they have abandoned.*" We find the cauſe of this in Polybius, who ſays, that Paulus Æmilius, after his victory, deſtroyed threeſcore and ten cities of Epirus, and carried away an hundred and fifty thouſand ſlaves.

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CHAP. XX.

That the Romans *were under a neceſſity of making laws, to encourage the propagation of the ſpecies.*

THE Romans, by deſtroying others, were themſelves deſtroyed: inceſſantly in action, in the heat of battle, and in the moſt violent attempts, they wore out like a weapon kept conſtantly in uſe. Book XXIII. Chap. 20. & 21.

I ſhall not here ſpeak of the attention with which they applied themſelves to procure * citizens in the room of thoſe they loſt, of the aſſociations they entered into, the privileges they beſtowed, and of that immenſe nurſery of citizens their ſlaves. I ſhall mention what they did to recruit the number, not of their citizens, but of their men; and as theſe were the people in the world, who knew beſt how to adapt their laws to their projects, an examination of what they did in this reſpect, cannot be a matter of indifference.

CHAP. XXI.

Of the laws of the Romans *relating to the propagation of the ſpecies.*

THE ancient laws of Rome endeavoured greatly to incite the citizens to marriage. The ſenate and the people made frequent regulations on this ſubject, as Auguſtus ſays in his ſpeech related by Dion (a).

(a) Lib. lvi.

Dionyſius Halicarnaſſeus (b) cannot believe, that after the death of three hundred and five of the Fabii, exterminated by the Veii, there remained no more of this family but one ſingle child; becauſe the ancient law which obliged every citizen to marry, and to educate all his children, was † ſtill in force.

(b) Lib. ii.

Independently

* A modern author has treated of this in his *Conſiderations on the cauſes of the riſe and declenſion of the Roman grandeur.*

† In the year of Rome 277.

BOOK XXIII. Chap. 21.

Independently of the laws, the cenſors had a particular eye upon marriages, and according to the exigencies of the republic, engaged them to it by * ſhame and by puniſhments.

The corruption of manners which began to take place, contributed vaſtly to diſguſt the citizens againſt marriage, which was painful to thoſe who had no taſte for the pleaſures of innocence. This is the purport of that ſpeech (a) which Metellus Numidicus when he was cenſor made to the people. "*If it* "*was poſſible for us to do without wives, we ſhould* "*deliver ourſelves from this evil: but as nature has* "*ordained that we cannot live very happily with* "*them, nor ſubſiſt without them, we ought to have* "*more regard to our own preſervation, than to* "*tranſient gratifications.*"

The corruption of manners deſtroyed the cenſorſhip, which was itſelf eſtabliſhed to deſtroy the corruption of manners: for when this corruption became general, the cenſor loſt his power. (b).

Civil diſcords, triumvirates, and proſcriptions, weakened Rome more than any war ſhe had hitherto engaged in. They left but few citizens, and the greateſt part of them unmarried. To remedy this laſt evil, Cæſar and Auguſtus re-eſtabliſhed the cenſorſhip, and would even be (c) cenſors themſelves. Cæſar gave (d) rewards to thoſe who had many children. All (e) women under forty-five years of age, who had neither huſband nor children, were forbid to wear jewels, or to ride in litters; an excellent method, thus to attack celibacy by the power of vanity. The laws of Auguſtus (f) were more preſſing: he impoſed (g) new penalties on thoſe who were not married, and increaſed the rewards both of thoſe who were married, and of thoſe who had children. Tacitus called theſe Julian laws (h); to all appearance

(a) It is in Aulus Gellius, lib. i. cap. 6.

(b) See what I have ſaid in Book v. Chap. 19.

(c) See Dion, Lib. xliii. and Xiphilinus in Auguſt.

(d) Dion, Lib. xliii. Suetonius's Life of Cæſar, Chap. xx. Apian, Lib. ii. of the Civil War.

(e) Euſebius in his Chronicle.

(f) Dion, Lib. liv.

(g) In the year of Rome 736.

(h) *Julias rogationes*, Annal. Lib. iii.

* See what was done in this reſpect in T. Livy, lib. xlv. The Epitome of T. Livy, lib. lix. Aulus Gellius, lib. i. cap. 6. Valerius Maximus, lib. ii. cap. 19.

appearance they were founded on the ancient regulations made by the ſenate, the people, and the cenſors.

The law of Auguſtus met with innumerable obſtacles, and thirty years (a) after it had been made, the Roman knights inſiſted on its being aboliſhed. He placed on one ſide thoſe who were married, and on the other thoſe who were not: theſe laſt appeared by far the greateſt number; upon which the citizens were aſtoniſhed and confounded. Auguſtus, with the gravity of the ancient cenſors, addreſſed them in this manner*.

(a) In the year of Rome 762. Dio. Lib. lvi.

"*While ſickneſs and war ſnatch away ſo many citizens, what muſt become of the city if marriages are no longer contracted? the city does not conſiſt of houſes, of porticos, of public places; men alone conſtitute a city. You do not ſee men, like thoſe mentioned in fable, ariſing out of the earth to take care of your Affairs. Your celibacy is not owing to the deſire of living alone: every one of you hath both table and bed companions. You only ſeek to enjoy your irregularities in peace. Do you here cite the example of the veſtal virgins? if you preſerve not the laws of chaſtity, you ought to be puniſhed like them. You are equally bad citizens, whether your example has an influence on the reſt of the world, or whether it be diſregarded. My only view is the perpetuity of the republic. I have increaſed the penalties of thoſe who have diſobeyed; and with reſpect to rewards, they are ſuch, as I do not know whether virtue has ever received greater. For leſs, will thouſands expoſe life itſelf, and yet will not theſe engage you to take a wife, and provide for children?*"

He made a law, which was called after his name *Julia*, and *Papia-Poppæa* from the names of the conſuls (b) for part of that year. The greatneſs of the evil appeared, even in their being elected: Dion

(b) Marcus Papius Mutilus, and Q. Poppæus Sabinus. Dio. Lib. lvi.

* I have abridged this ſpeech, which is of a tedious length: it is to be found in Dion, lib. lvi.

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Dion (a) tells us, that they were not married, and that they had no children.

This law of Auguſtus was properly a code of laws, and a ſyſtematic body of all the regulations that could be made on this ſubject. The Julian * laws were incorporated into it; and received a greater ſtrength. It was ſo extenſive in its uſe, and had an influence on ſo many things, that it formed the fineſt part of the civil law of the Romans.

We find † parts of it diſperſed in the precious fragments of Ulpian, in the laws of the Digeſt, collected from authors who wrote on the Papian laws, in the hiſtorians and others who have cited them, in the Theodoſian code which aboliſhed them, in the works of the fathers who have cenſured them, without doubt from a laudable zeal for the things of another life, but with very little knowledge of the affairs of this.

Theſe laws had many heads §, of which we know thirty-five. But, to return to my ſubject as ſpeedily as poſſible, I ſhall begin with that head, which Aulus Gellius (b) informs us was the ſeventh, and which relates to the honors and rewards granted by that law.

The Romans, who for the moſt part ſprung from the cities of the Latins, which were Lacedemonian (c) colonies, and who had received a part of their laws even from thoſe cities ‖, had, like the Lacedemonians, ſuch a veneration for old age, as to give it all honor and precedency. When the republic wanted citizens, they granted to marriage, and to a number of children, the prerogatives which had been given to age (d). They granted ſome to marriage alone,

(a) Ibid.

(b) Lib. ii. Cap. 15.

(c) Dionyſ. Halicarnaſſeus.

(d) Aulus Gellius, Lib. ii. Cap. 15.

* The 14th title of the fragments of Ulpian diſtinguiſhes very rightly between the Julian and the Papian law.

† James Godfrey has made a collection of theſe.

§ The 35th is cited in the 19th law *ff. de ritu nuptiarum.*

‖ The deputies of Rome, who were ſent to ſearch into the laws of Greece, went to Athens, and to the cities of Italy.

alone, independently of the children which might ſpring from it: this was called the right of huſbands. They gave others to thoſe who had any children, and larger ſtill to thoſe who had three children. Theſe three things muſt not be confounded. Theſe laſt had thoſe privileges which married men conſtantly enjoyed, as for example, a particular place in the theatre (a); they had thoſe which could only be enjoyed by men who had children; and which none could deprive them of, but thoſe who had a greater number.

(a) Sueto-nius *in Auguſto*, Chap. 44.

Theſe privileges were very extenſive. The married men who had the moſt children, were always preferred *, whether in the purſuit, or in the exerciſe of honors. The conſul, who had the moſt numerous offspring, was the (b) firſt who received the faſces; he had his choice of the (c) provinces: the ſenator who had moſt children, had his name wrote firſt in the catalogue of ſenators, and was the firſt in giving his opinion (d) in the ſenate. They might even ſtand ſooner than ordinary for an office, becauſe every child gave a diſpenſation of a year (e). If an inhabitant of Rome had three children, he was exempted from all troubleſome offices (f). The free-born women who had three children, and the freed-women who had four, paſſed (g) out of that perpetual tutelage, in which they had been held (h) by the ancient laws of Rome.

(b) Aulus Gellius, Lib. ii. Cap. 15.

(c) Tacitus Annal. Lib. xv.

(d) See Law 6 §. 5. *de Decurion.*

(e) See Law 2. ff. *de Minorib.*

(f) Law 1ſt and 2d. ff. *de vacatione & excuſat. munerum.*

(g) Frag. of Ulpian, tit. 29. §. 3.

(h) Plutarch Life of Numa.

As they had rewards, ſo they had alſo penalties †. Thoſe who were not married could receive no advantage from the will of any perſon that was not a near relation ‖; and thoſe who being married, had

* Tacitus, lib. ii. *Ut numerus liberorum in candidatis præpolleret, quod lex jubebat.*

† See the fragments of Ulpian, tit. 14, 15, 16, 17, & 18. which compoſe one of the fineſt pieces of the ancient civil law of the Romans.

‖ Sozom. lib. i. cap. 9. they could receive from their relations. Fragm. of Ulpian, tit. 16. §. 1.

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had no children, could receive only half *. The Romans, says Plutarch †, marry to *be* heirs, and not to *have* them.

The advantages which a man and his wife might receive ‖ by will, were limited by law. If they had children of each other, they might receive the whole; if not they could receive only a tenth part of the succession on the account of marriage; and if they had children by a former marriage, as many tenths as they had children.

(a) Frag. of Ulpian, tit. 16. §. 1.

If an husband absented himself (a) from his wife on any other cause than the affairs of the republic, he could not inherit.

The law gave to a surviving husband or wife two years ** to marry again, and a year and an half in case of a divorce. The fathers who would not suffer their children to marry, or refused to give their daughters a portion, were obliged to do it by the magistrates ††.

(b) See Dio lib. liv. anno 736. Suetonius in Octavio, cap. 34.

They were not allowed to betroth, when the marriage was to be deferred for more than two years (b); and as they could not marry a girl till she was twelve years old, they could not be betrothed to her till she was ten. The law would not suffer them to trifle (c) to no purpose; and, under a pretence of being betrothed, to sport with the privileges of married men.

(c) Dio. L. liv. and in the same Dio the speech of Augustus, lib. lvi,

It

* Sozom. lib. i. cap. 9. & leg. unic. cod. Theod. *de infirm. pœnis cœlib. & orbit.*

† *Moral works*, of the love of fathers towards their children.

‖ See a more particular account of this in the Fragm. of Ulpian, tit. 15, & 16.

** *Fragm. of Ulpian*, tit. 14. It seems the first Julian laws allowed three years, *Speech of Augustus in Dio*, lib. lvi. *Suetonius life of Augustus*, cap. 34. Other Julian laws granted but one year: the Papian law gave two. *Fragm. of Ulpian.* tit. 14. These laws were not agreeable to the people, Augustus therefore softened or strengthened them, as they were more or less disposed to comply with them.

†† This was the 35th head of the Papian law. Leg. 19, ff. *de ritu nuptiarum.*

It was contrary to law, for a man of sixty to marry a woman of fifty. As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason, the Calvisian decree of the senate declared the marriage of a woman of above fifty, with a man less than sixty, to be (b) unequal: so that a woman of fifty years of age could not marry, without incurring the penalties of these laws. Tiberius added (c) to the rigour of the Papian law, and prohibited men of sixty, from marrying women under fifty; so that a man of sixty could not marry in any case whatsoever, without incurring the penalty. But Claudius abrogated (d) this law made under Tiberius.

All these regulations were more conformable to the climate of Italy, than to that of the North, where a man of sixty years of age has still a considerable degree of strength; and where women of fifty, are not always past child-bearing.

That they might not be unnecessarily limited in the choice they were to make, Augustus permitted all the free-born citizens who were not senators (e), to marry freed-women (f). The Papian (g) law forbad the senators marrying freed-women, or those who had been brought up to the Stage; and from the time of (h) Ulpian, free-born persons were forbid to marry women who had led a disorderly life, who had played in the theatre, or who had been condemned by a public sentence. This must have been established by a decree of the senate. During the time of the republic they had never made laws like these, because the censors corrected these kinds of disorders as soon as they arose, or else prevented their rising.

Constantine (i) made a law, in which he comprehended in the prohibition of the Papian law, not only the senators, but even those who had a considerable rank in the state, without mentioning per-

(a) Book XXIII. Chap. 21.
(a) Fragm. of Ulpian. tit. 16. the 27th law, Cod. *de nuptiis.*
(b) Fragm. of Ulpian, tit. 16. § 3.
(c) See Suetonius in Claudio, cap. 23.
(d) See Suetonius, life of Claudius, cap. 23. and the Fragm. of Ulpian, tit. 16. § 3.
(e) Dio. L. liv. Fragm. of Ulpian, tit. 13.
(f) Augustus's speech in Dio, lib. lvi.
(g) Frag. of Ulpian, chap. 13. and the 44th law, ff. *de ritu nuptiarum.*
(h) Frag. of Ulpian, tit. 13. and 16.
(i) See Law I. of Cod. *de natur.* lib.

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ſons in an inferior ſtation: this conſtituted the law of thoſe times. Theſe marriages were therefore no longer forbidden, but to the free-born comprehended in the law of Conſtantine. Juſtinian (a) however abrogated the law of Conſtantine, and permitted all ſorts of perſons to contract theſe marriages: and by theſe means we have acquired ſo fatal a liberty.

(a) Novel. 177.

It is evident, that the penalties inflicted on thoſe who married contrary to the prohibition of the law, were the ſame as thoſe inflicted on perſons who did not marry. Theſe marriages did not give them any civil advantage (b), for the dowry ( ) was confiſcated (d) after the death of the wife.

(b) Law 37. ff. *de operib. libertorum.* §. 7. Frag. of Ulpian, tit. 16. §. 2.

(c) Fragm. of Ulpian, tit. 16 §. 3.

(d) See Book xxvi. Chap. 13.

Auguſtus having adjudged the ſucceſſion and legacies of thoſe whom theſe laws had declared incapable to the public treaſury *, they had the appearance rather of fiſcal, than of political and civil laws. The diſguſt they had already conceived at a burthen which appeared too heavy, was increaſed by their ſeeing themſelves a continual prey to the avidity of the treaſury. On this account, it became neceſſary under Tiberius, that † theſe laws ſhould be ſoftened, that Nero ſhould leſſen the rewards given out of the treaſury to the ‖ informers, that Trajan (e) ſhould put a ſtop to their plundering, that Severus § ſhould alſo moderate theſe laws, and that the civilians ſhould conſider them as odious, and in all their deciſions deviate from the literal rigour.

(e) See Pliny's panegyric.

Beſides,

* Except in certain caſes. See the *Fragm. of Ulpian*, tit. 18. and the only law of *Code de Caduc. tollend.*

† *Relatum de moderanda Papiâ Poppæâ.* Tacit. Annal. lib. iii. pag. 117.

‖ He reduced them to the fourth part. *Suetonius in Nerone*, cap. 10.

§ Severus extended even to twenty-five years for the males, and to twenty for the females, the time fixed by the Papian law, as we ſee by comparing the *Fragment of Ulpian*, tit. 16. with what Tertullian ſays, *Apol.* cap. 4.

Beſides, the emperors enervated * theſe laws, by the privileges they gave, of the rights of huſbands, of children, and of three children. Moreover, they gave (a) particular perſons a diſpenſation from the penalties of theſe laws. But the regulations eſtabliſhed for the public utility, ſeemed incapable of admitting an alleviation. Book XXIII. Chap. 21.

(a) See the 31ſt Law, ff. *de ritu nuptiarum.*

It was highly reaſonable, that they ſhould grant the rights of children to the veſtals †, whom religion retained in a neceſſary virginity: they gave in the ſame manner the privilege of § married men to ſoldiers, becauſe they could not marry. It was cuſtomary to exempt the emperors from the conſtraint of certain civil laws. Thus Auguſtus was freed from the conſtraint of the law which limited the power of (b) enfranchiſing, and of that which ſet bounds to the right of ( ) bequeathing by teſtament. Theſe were only particular caſes: but at laſt diſpenſations were given without diſcretion, and the rule itſelf became no more than an exception.

(b) Leg. apud eum, ff. *de manumiſſionib.* §. 1.

(c) Dio lib. lv.

The ſects of philoſophers had already introduced in the empire a diſpoſition that eſtranged them from buſineſs; a diſpoſition which could not gain ground in the time of the ** republic, when every body was employed in the arts of war and peace. From hence aroſe an idea of perfection, as connected with a life of ſpeculation; from hence an eſtrangement from the cares and embarraſſments of a family. The Chriſtian religion coming after this philoſophy, fixed,

* P. Scipio, the cenſor, complains in his ſpeech to the people of the abuſes which were already introduced, that they received the ſame privileges for adopted as for natural children. *Aulus Gellius*, lib. v. cap. 19.

† Auguſtus in the Papian law, gave them the privilege of mothers. See *Dio* lib. lvi. Numa had given them the ancient privilege of women who had three children, that is, of having no guardian. *Plutarch, life of Numa.*

§ This was granted them by Claudius. *Dio lib.* lx.

** See in *Cicero's Offices*, his ſentiments on this ſpirit of ſpeculation.

BOOK. XXIII. Chap. 21.

ed, if I may make uſe of the expreſſion, the ideas which that had only prepared.

Chriſtianity ſtamped its character on juriſprudence; for empire has always a connexion with the prieſthood. This is viſible from the Theodoſian code, which is only a collection of the decrees of the Chriſtian emperors.

A panegyriſt (a) of Conſtantine ſays to that emperor, "*Your laws were made only to correct vice, and to regulate manners: you have ſtripped the ancient laws of that artifice, which ſeemed to have no other aim than to lay ſnares for ſimplicity.*"

(a) Nazarius *in Panegyrico Conſtantini*, anno 321.

It is certain, that the alterations made by Conſtantine took their riſe, either from ſentiments relating to the eſtabliſhment of Chriſtianity, or from ideas conceived of its perfection. From the firſt, proceeded thoſe laws which gave ſuch authority to biſhops, and which have been the foundation of the eccleſiaſtical juriſdiction: from hence thoſe laws which weakened paternal authority (b), by depriving the father of his property in the poſſeſſions of his children. To extend a new religion, they were obliged to take away the dependance of children, who are always leaſt attached to what is already eſtabliſhed.

(b) See Law, 1, 2, 3. in the Theodoſian code, *de bonis maternis, maternique generis*, &c. and the only law of the code, *de bonis quæ filiis famil. acquiruntur.*

The laws made with a view to Chriſtian perfection, were more particularly thoſe by which the (c) penalties of the Papian laws were aboliſhed; thoſe who were not married were equally exempt from them, with thoſe who being married had no children.

(c) Leg. unic. cod. Theod. *de infirm. pœn. cœlib. & orbit.*

"*Theſe laws were eſtabliſhed*, ſays an eccleſiaſtic (d) hiſtorian, *as if the multiplication of the human ſpecies was an effect of our care, inſtead of being ſenſible that the number is increaſed or diminiſhed, according to the order of providence.*"

(d) Sozamenus, pag. 27.

The principles of religion have had an extraordinary influence on the propagation of the human ſpecies. Sometimes they have promoted it as amongſt the

Jews,

Jews, the Mahometans, the Gebres, the Chineſe; at others, they have put a damp to it, as was the caſe of the Romans upon their converſion to Chriſtianity.

They every where inceſſantly preached up continency; a virtue the more perfect, becauſe in its own nature it can be practiſed but by very few.

Conſtantine had not taken away the decimal laws, which granted to the huſband and wife a greater ſhare in the donations made to them, in proportion to the number of their children: Theodoſius the younger (a) abrogated even theſe laws.

Juſtinian declared all thoſe marriages (b) valid, which had been prohibited by the Papian laws. Theſe laws required people to marry again: Juſtinian granted (c) privileges to thoſe who did not marry again.

By the ancient laws, the natural right which every one had to marry, and beget children, could not be taken away. Thus when they received a (d) legacy on condition of not marrying, when a patron made his (e) freed-man ſwear, that he would neither marry nor beget children, the Papian law annulled both the (f) condition and the oath. The articles *on continuing in widowhood* eſtabliſhed amongſt us, contradict the ancient law, and deſcend from the conſtitutions of the emperors, founded on ideas of perfection.

There is no law that contains an expreſs abrogation of the privileges and honors which the Romans had granted to marriages, and to a number of children. But where celibacy had the pre-eminence, marriage could not be held in honor; and ſince they could oblige the officers of the public revenue to renounce ſo many advantages by the abolition of the penalties, it is eaſy to perceive that with yet greater eaſe they might put a ſtop to the rewards.

The ſame ſpiritual reaſon which had permitted celibacy, ſoon impoſed it even as neceſſary. God

(a) Leg. 2. & 3. cod. *Theod. de jur. liber.*

(b) Leg. Sancimus cod. *de nuptiis.*

(c) Novell. 127. cap. 3. Novell. 118. ca. 5.

(d) Leg. 54. ff. *de condit. & demonſt.*

(e) Leg. 5. §. 4. *de jure patronatûs.*

(f) Paul *in his ſententces*, lib. iii. tit. 4. §. 15.

Book XXIII. Chap. 22.

forbid that I ſhould here ſpeak againſt celibacy, as adopted by religion: but who can be ſilent, when this is built on libertiniſm; when the two ſexes corrupting each other, even by the natural ſenſations themſelves, fly from an union which ought to make them better, to live in that which always renders them worſe?

It is a rule drawn from nature, that the more the number of marriages is diminiſhed, the more corrupt are thoſe who have entered into that ſtate; the fewer married men, the leſs fidelity is there in marriage; as when there are more thieves, there are more thefts.

CHAP. XXII.

Of the expoſing of children.

THE Roman policy was very good, in reſpect to the expoſing of children. Romulus, ſays Dionyſius Halicarnaſſeus (a), laid all the citizens under an obligation to educate all their male children, and the eldeſt of their daughters. If the infants were deformed and monſtrous, he permitted the expoſing them, after having ſhewn them to five of their neareſt neighbours.

(a) Antiquities of Rome, lib. ii.

Romulus did not ſuffer (b) them to kill any infant under three years old: by this means he reconciled the law which gave to fathers the right over their children of life and death, with that which prohibited their being expoſed.

(b) Antiquities of Rome, lib. ii.

We find alſo in Dionyſius Halicarnaſſeus (c), that the law which obliged the citizens to marry, and to educate all their children, was in force in the 277th year of Rome: we ſee that cuſtom had reſtrained the law of Romulus, which permitted them to expoſe their younger daughters.

(c) Lib. ix.

We have no knowledge of what the law of the twelve tables (made in the year of Rome 301), appointed with reſpect to the expoſing of children, except

except from a paſſage of Cicero (a), who ſpeaking of the office of tribune of the people, ſays, that ſoon after its birth, like the monſtrous infant of the law of the twelve tables, it was ſtifled: the infant that was not monſtrous was therefore preſerved, and the law of the twelve tables made no alteration in the preceding inſtitutions. Book XXIII. Chap. 23.

(a) Lib. iii. *de legib.*

"*The Germans*, ſays Tacitus (b), *never expoſe their children; amongſt them the beſt manners have more force, than in other places the beſt laws.*" The Romans had therefore laws againſt this cuſtom, and yet they did not follow them. We find not any *Roman law, that permitted the expoſing of children, this was without doubt, an abuſe introduced towards the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was loſt which was given to his family, and when this family was diſtinct from his property.

(b) *De morib. Germ.*

CHAP. XXIII.

Of the ſtate of the univerſe after the deſtruction of the Romans.

THE regulations made by the Romans to increaſe the number of their citizens, had their effect, while the republic, in the full vigour of its conſtitution, had nothing to repair but the loſſes they ſuſtained by their courage, by their intrepidity, their firmneſs, their love of glory, and of virtue. But ſoon the wiſeſt laws could not re-eſtabliſh what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud deſpotic power, what a feeble monarchy, what a ſtupid, weak and ſuperſtitious court had ſucceſſively pulled down. It might indeed be ſaid, that they conquered the world only to weaken it, and to deliver it up defenceleſs to barbarians. The Gothic

* There is not any title on this ſubject in the Digeſt; the title of the code ſays nothing of it, no more than the Novels.

Book XXIII. Chap. 24.

Gothic nations, the Getes, the Saracens, and Tartars, by turns haraſſed them: Soon the barbarians had none to deſtroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there aroſe out of the earth armed men, who exterminated one another.

CHAP. XXIV.

The changes which happened in Europe, *with regard to the number of the inhabitants.*

IN the ſtate Europe was in, one would not imagine it poſſible for it to be retrieved; eſpecially when under Charlemain it formed only one vaſt empire. But by the nature of government at that time, it became divided into an infinite number of petty ſovereignties; and as the lord or ſovereign who reſided in his village, or city, was neither great, rich, powerful, nor even ſafe, but by the number of his ſubjects; every one employed himſelf with a ſingular attention to make his little country flouriſh. This ſucceeded in ſuch a manner, that notwithſtanding the irregularities of government, the want of that knowledge which has ſince been acquired in commerce, and the numerous wars and diſorders inceſſantly ariſing, moſt countries of Europe were better peopled in thoſe days, than they are even at preſent.

I have not time to treat fully of this ſubject. But I ſhall cite the prodigious armies engaged in the cruſadoes, compoſed of men of all countries. Puf-

(a) Hiſt. of the univerſe, chap. 5. of France.

fendorff (a) ſays, that in the reign of Charles IX. there were in France twenty millions of men.

'Tis the perpetual re-union of many little ſtates that has produced this diminution. Formerly every village of France was a capital; there is at preſent only one large one: every part of the ſtate was a center of power, at preſent all has a relation to one

center

center; and this center is, in ſome meaſure, the ſtate itſelf.

CHAP. XXV.

The ſame ſubject continued.

EUROPE, it is true, has for theſe two ages paſt greatly increaſed its navigation: This has both procured and deprived it of inhabitants. Holland ſends every year a great number of mariners to the Indies; of whom not above two thirds return: the reſt either periſh or ſettle in the Indies. The ſame thing muſt happen to every other nation engaged in that trade.

We muſt not judge of Europe, as of a particular ſtate engaged alone in an extenſive navigation. This ſtate would increaſe in people, becauſe all the neighbouring nations would endeavour to have a ſhare in this commerce; and mariners would arrive from all parts. Europe ſeparated from the reſt of the world by religion*, by vaſt ſeas, and deſarts, could not be repaired in this manner.

CHAP. XXVI.

Conſequences.

FROM all this we may conclude, that Europe is at preſent in a condition to require laws to be made in favour of the propagation of the human ſpecies. The politics of the ancient Greeks inceſſantly complain of the inconveniences that attend a republic from the exceſſive number of citizens; but the politicks of this age call upon us to take proper means to increaſe ours.

* Mahometan countries ſurround it almoſt on every ſide.

CHAP.

CHAP. XXVII.

Of the law made in France *to encourage the propagation of the ſpecies.*

Book XXIII. Chap. 27. & 28.

LEWIS XIV. appointed (a) particular penſions to thoſe who had ten children, and much larger to thoſe who had twelve. But it is not ſufficient to reward prodigies. In order to communicate a general ſpirit which leads to the propagation of the ſpecies, it is neceſſary for us to eſtabliſh, like the Romans, general rewards, or general penalties.

(a) The Edict of 1666, in favour of marriages.

CHAP. XXVIII.

By what means we may remedy a depopulation.

WHEN a ſtate is depopulated by particular accidents, by wars, peſtilence, or famine, there are ſtill reſources left. The men who remain may preſerve the ſpirit of induſtry; they may ſeek to repair their misfortunes, and calamity itſelf may make them become more induſtrious. The evil is almoſt incurable, when the depopulation is prepared before-hand by interior vice and a bad government. When this is the caſe, men periſh with an inſenſible and habitual ſickneſs: born in miſery and languiſhing weakneſs, in violence or under the influence of a wicked adminiſtration, they ſee themſelves deſtroyed, and frequently without perceiving the cauſe of their deſtruction. Of this we have a melancholy proof, in the countries deſolated by deſpotic power, or by the exceſſive advantages of the clergy over the laity.

In vain ſhall we wait for the ſuccour of children yet unborn, to re-eſtabliſh a ſtate thus depopulated. There is not time for this; men in their ſolitude are without courage or induſtry. With land ſufficient to nouriſh a people, they have ſcarcely enough to nouriſh a family. The common people have not even

even a property in the miſeries of the country; that is, in the fallows with which it abounds. The clergy, the prince, the cities, the great men, and ſome of the principal citizens, inſenſibly become proprietors of all the land, which lies uncultivated: the families who are ruined have left their fields; and the labouring man is deſtitute.

In this ſituation they ſhould take the ſame meaſures throughout the whole extent of the empire, which the Romans took in a part of theirs: they ſhould practiſe in their diſtreſs, what theſe obſerved in the midſt of plenty; that is, they ſhould diſtribute land to all the families who are in want, and procure them the materials for clearing and cultivating it. This diſtribution ought to be continued as long as there is a man to receive it; and in ſuch a manner, that not a moment for labour be loſt.

CHAP. XXIX.

Of hoſpitals.

A Man is not poor becauſe he has nothing, but becauſe he does not work. The man who without any degree of wealth has an employment, is as much at his eaſe as he who without labour has an income of an hundred crowns a year. He who has no ſubſtance, and yet has a trade, is not poorer than he who poſſeſſing ten acres of land is obliged to cultivate it for his ſubſiſtence. The mechanic who gives his art as an inheritance to his children, has left them a fortune which is multiplied in proportion to their number. It is not ſo with him, who having ten acres of land, divides it amongſt his children.

In trading countries, where many men have no other ſubſiſtence but from the arts, the ſtate is frequently obliged to ſupply the neceſſities of the aged, the ſick, and the orphan. A regular policied government draws this ſupport from the arts themſelves,

Book XXIII. Chap. 29.

ſelves. It gives to ſome ſuch employment as they are capable of performing; others are taught to work, and this teaching of itſelf becomes an employment.

Thoſe alms which are given to a naked man in the ſtreet do not fulfil the obligations of the ſtate, which owes to every citizen a certain ſubſiſtence, a proper nouriſhment, convenient cloathing, and a kind of life not incompatible with health.

(a) See Sir John Chardin's Travels thro' Perſia, Vol. 8.

Aurengzebe (a) being aſked, why he did not build hoſpitals, ſaid, "*I will make my empire ſo* "*rich, that there ſhall be no need of hoſpitals.*" He ought to have ſaid, I will begin by rendering my empire rich, and then I will build hoſpitals.

The riches of a ſtate ſuppoſe great induſtry. Amidſt the numerous branches of trade, it is impoſſible but ſome muſt ſuffer; and conſequently the mechanics muſt be in a momentary neceſſity.

When this is the caſe, the ſtate is obliged to lend them a ready aſſiſtance; whether it be to prevent the ſufferings of the people, or to avoid a rebellion. In this caſe hoſpitals, or ſome equivalent regulations, are neceſſary to prevent this miſery.

But when the nation is poor, private poverty ſprings from the general calamity; and is, if I may ſo expreſs myſelf, the general calamity itſelf. All the hoſpitals in the world cannot cure this private poverty: on the contrary, the ſpirit of indolence which it conſtantly inſpires, increaſes the general, and conſequently the private miſery.

(b) See Burnet's *Hiſt. of the Reformation.*

Henry VIII. (b) reſolving to reform the church of England, ruined the monks, of themſelves a lazy ſet of people that encouraged lazineſs in others; becauſe as they practiſed hoſpitality, an infinite number of idle perſons, gentlemen and citizens, ſpent their lives in running from convent to convent. He demoliſhed even the hoſpitals in which the lower people found ſubſiſtence, as the gentlemen did theirs in the monaſteries. Since theſe changes, the ſpirit of trade and induſtry has been eſtabliſhed in England.

At

At Rome, the hoſpitals place every one at his eaſe, except thoſe who labour, except thoſe who are induſtrious, except thoſe who have land, except thoſe who are engaged in trade. Book XXIII. Chap. 29.

I have obſerved, that wealthy nations have need of hoſpitals, becauſe fortune ſubjects them to a thouſand accidents: but 'tis plain that tranſient aſſiſtances are much better than perpetual foundations. The evil is momentary; it is neceſſary therefore, that the ſuccour ſhould be of the ſame nature, and that it be applied to particular accidents.

BOOK XXIV.

Of laws as relative to religion, conſidered in itſelf, and in its doctrines.

CHAP. I.

Of religion in general.

AS amidſt ſeveral degrees of darkneſs we may form a judgment of thoſe which are the leaſt thick, and among precipices, which are the leaſt deep; ſo we may ſearch among falſe religions for thoſe that are moſt conformable to the welfare of ſociety; for thoſe, which, though they have not the effect of leading men to the felicity of another life, may contribute moſt to their happineſs in this. Book XXIV. Chap. 1.

I ſhall examine therefore the ſeveral religions of the world in relation only to the good they produce in civil ſociety; whether I ſpeak of that which has its root in heaven, or of thoſe which ſpring from the earth.

As in this work I am not a divine, but a political writer, I may here advance things which are no otherwiſe true, than as they correſpond with a worldly manner of thinking, not as conſidered in their relation to truths of a more ſublime nature.

A perſon

Book XXIV. Chap. 2.

A perſon of the leaſt degree of impartiality muſt ſee that I have never pretended to make the intereſts of religion ſubmit to thoſe of a political nature, but rather to unite them: now, in order, to unite, it is neceſſary that we ſhould know them.

The Chriſtian religion, which ordains that men ſhould love each other, would without doubt have every nation bleſt with the beſt civil, the beſt political laws; becauſe theſe, next to this religion, are the greateſt good that men can give and receive.

CHAP. II.

A paradox of Mr. Bayle's.

(a) Thoughts on the Comet.

MR. (a) Bayle has pretended to prove, that it is better to be an atheiſt than an idolater; that is, in other words, that it is leſs dangerous to have no religion at all, than a bad one. "*I had rather*, "ſaid he, *it ſhould be ſaid of me, that I had no ex-* "*iſtence, than that I am a villain.*" This is only a ſophiſm, founded on this, that it is of no importance to the human race to believe that a certain man exiſts; whereas it is extremely uſeful for them to believe the exiſtence of a God. From the idea of his non-exiſtence, immediately follows that of our independence; but if we cannot conceive this idea, that of diſobedience. To ſay that religion is not a reſtraining motive, becauſe it does not always reſtrain, is equally abſurd as to ſay that the civil laws are not a reſtraining motive. It is a falſe way of reaſoning againſt religion, to collect in a large work a long detail of the evils it has produced, if we do not give at the ſame time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have ariſen in the world from civil laws, from monarchy, and from republican government, I might tell of frightful things. Was it of no advantage for ſubjects to have religion, it would ſtill be of ſome if princes had it, and if they whitened

whitened with foam the only rein which can reſtrain thoſe who fear not human laws. A prince, who loves and fears religion, is a lion who ſtoops to the hand that ſtrokes, or the voice that appeaſes him. He, who fears and hates religion, is like the ſavage beaſt that growls and bites the chain, which prevents his flying on the paſſenger. He who has no religion at all, is that terrible animal, who perceives his liberty only when he tears in pieces, and when he devours.

The queſtion is not to know, whether it would be better that a certain man, or a certain people had no religion, than to abuſe what they have; but to know which is the leaſt evil, that religion be ſometimes abuſed, or that there be no ſuch reſtraint as religion on mankind.

To diminiſh the horror of atheiſm, they lay too much to the charge of idolatry. It is far from being true, that when the ancients raiſed altars to a particular vice, they intended to ſhew that they loved the vice; this ſignified on the contrary, that they hated it. When the Lacedemonians erected a temple to Fear, it was not to ſhew that this warlike nation deſired that he would in the midſt of battle poſſeſs the hearts of the Lacedemonians. They had deities to whom they prayed not to inſpire them with guilt; and others, whom they beſought to ſhield them from it.

CHAP. III.

That a moderate government is moſt agreeable to the Chriſtian religion, and a deſpotic government to the Mahometans.

THE Chriſtian religion is a ſtranger to mere deſpotic power. The mildneſs ſo frequently recommended in the goſpel, is incompatible with the deſpotic rage with which a prince puniſhes his ſubjects, and exerciſes himſelf in cruelty.

Book XXIV. Chap. 3.

As this religion forbids the plurality of wives, its princes are leſs confined, leſs concealed from their ſubjects, and conſequently have more humanity: they are more diſpoſed to be directed by laws, and more capable of perceiving that they cannot do whatever they pleaſe.

While the Mahometan princes inceſſantly give or receive death, the religion of the Chriſtians renders their princes leſs timid, and conſequently leſs cruel. The prince confides in his ſubjects, and the ſubjects in the prince. How admirable the religion, which while it ſeems only to have in view the felicity of the other life, conſtitutes the happineſs of this!

'Tis the Chriſtian religion, that in ſpite of the extent of empire, and the influence of climate, has hindered deſpotic power from being eſtabliſhed in Æthiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the empire of Æthiopia enjoys a principality, and gives to other ſubjects an example of love and obedience. Not far from thence may be ſeen the Mahometan ſhutting up the children of the king (a) of Sennao; at whoſe death the council ſends to murder them, in favour of the prince who mounts the throne.

(a) Deſcription of Æthiopia, by M. Poncet the phyſician. *Collection of edifying Letters.*

Let us ſet before our eyes on the one hand the continual maſſacres of the kings and generals of the Greeks and Romans; and on the other, the deſtruction of people and cities by the commanders *Thimur* and *Gengiſkan*, who ravaged Aſia; and we ſhall ſee that we owe to chriſtianity, in government a certain political law, and in war a certain law of nations, benefits which human nature can never ſufficiently acknowledge.

It is owing to this law of nations, that amongſt us victory leaves theſe great advantages to the conquered, life, liberty, laws, wealth, and always religion, when the conqueror is not blind to his own intereſt.

We

We may truly ſay, that the people of Europe are not at preſent more diſunited, than the people and the armies, or even the armies amongſt themſelves were under the Roman empire, when it was become a deſpotic and military government. On the one hand, the armies engaged in war againſt each other; and, on the other, they pillaged the cities, and divided or confiſcated the lands. Book XXIV. Chap. 4. & 5.

CHAP. IV.

Conſequences from the character of the Chriſtian religion, and that of the Mahometan.

FROM the characters of the Chriſtian and Mahometan religions we ought, without any further examination, to embrace the one, and reject the other: for it is much eaſier to prove, that religion ought to humanize the manners of men, than that any particular religion is true.

It is a misfortune to human nature, when religion is given by a conqueror. The mahometan religion, which ſpeaks only by the ſword, acts ſtill upon men with that deſtructive ſpirit with which it was founded.

The hiſtory of Sabbaco (a), one of the paſtoral kings of Egypt, is very extraordinary. The god of Thebes appearing to him in a dream, ordered him to put to death all the prieſts of Egypt. He judged that the gods were diſpleaſed at his being on the throne, ſince they ordered him to commit an action contrary to their ordinary pleaſure, and therefore retired into Æthiopia.

(a) See Diodorus, Lib. ii.

CHAP. V.

That the Catholic religion is moſt agreeable to a monarchy, and the Proteſtant to a republic.

WHEN a religion is introduced and fixed in a ſtate, it is commonly ſuch as is moſt ſuit-

Book XXIV. Chap. 6.

able to the plan of government there eſtabliſhed: for thoſe who receive it, and thoſe who are the cauſe of its being received, have ſcarcely any other idea of policy than that of the ſtate in which they were born.

When the Chriſtian religion two centuries ago, became unhappily divided into Catholic and Proteſtant, the people of the north embraced the Proteſtant; and thoſe of the ſouth adhered ſtill to the Catholic.

The reaſon is plain: the people of the north have, and will for ever have a ſpirit of liberty and independence, which the people of the ſouth have not; and therefore a religion, which has no viſible head, is more agreeable to the independency of the climate than that which has one.

In the countries themſelves where the Proteſtant religion became eſtabliſhed, the revolutions were made purſuant to the ſeveral plans of political government. Luther having great princes on his ſide, would never have been able to make them reliſh an eccleſiaſtic authority that had no exterior pre-eminence; while Calvin, having to do with people who lived under republican governments, or with obſcure citizens in monarchies, might very well avoid eſtabliſhing dignities and pre-eminence.

Each of theſe two religions were believed to be the moſt perfect; the Calviniſt judging his moſt conformable to what Chriſt had ſaid, and the Lutheran to what the Apoſtles had practiſed.

CHAP. VI.

Another of Mr. Bayle's *paradoxes.*

MR. Bayle after having abuſed all religions, endeavours to ſully Chriſtianity: he boldly aſſerts that true Chriſtians cannot form a government of any duration. Why not? citizens of this profeſſion being infinitely enlightened with reſpect to the various

various duties of life, and having the warmeſt zeal to fulfil them, muſt be perfectly ſenſible of the rights of natural defence. The more they believe themſelves indebted to religion, the more they would think due to their country. The principles of chriſtianity deeply engraved on the heart, would be infinitely more powerful than the falſe honor of monarchies, than the humane virtues of republicks, or the ſervile fear of deſpotic ſtates. Book XXIV. Chap. 7.

It is aſtoniſhing, that this great man ſhould lay himſelf open to the charge of not knowing the ſpirit of his own religion, that he ſhould not be able to diſtinguiſh between the orders for the eſtabliſhment of Chriſtianity, and Chriſtianity itſelf, nor the precepts of the goſpel, from counſels. When the legiſlator, inſtead of laws, has given counſels, 'tis becauſe he ſaw, that if his counſels were ordained as laws, they would be contrary to the ſpirit of his laws themſelves.

CHAP. VII.

Of the laws of perfection in religion.

HUman laws made to direct the will, ought to give precepts, and not counſels; thoſe of religion made to influence the heart, ought to give many counſels and few precepts.

When, for inſtance, it gives rules not for what is good, but for what is better; not to direct to what is right, but to what is perfect; it is expedient, that theſe ſhould be counſels, and not laws: for perfection can have no relation to the univerſality of men, or things. Beſides, if theſe were laws, there would be a neceſſity for an infinite number of others to make people obſerve the firſt. Celibacy was adviſed by Chriſtianity: when they made it a law in reſpect to a certain order of men, it became neceſſary to make new (*) ones every day, in order to oblige thoſe men to obſerve it. The legiſlator wearied himſelf, he wearied ſociety, to make men execute by precept, what thoſe who love perfection would have executed as counſel.

(a) *Dupin's* Eccleſiaſtical Library of the 6th Century, Vol. 5.

CHAP. VIII.
Of the connection between the moral laws and those of religion.

BOOK XXIV. Chap. 8, 9, & 10.

IN a country ſo unfortunate as to have a religion that God has not revealed, it is always neceſſary for it to be agreeable to morality; becauſe religion though falſe, is the beſt ſecurity we can have of the probity of men.

The principal points of religion of the inhabitants of Pegu (a), are not to commit murder, not to ſteal, to avoid uncleanneſs, not to give the leaſt uneaſineſs to their neighbour, but to do him, on the contrary, all the good in their power. With theſe rules they think they ſhould be ſaved in any religion whatſoever. From hence it proceeds, that theſe people, though poor and proud, behave with gentleneſs and compaſſion to the unhappy.

(a) Collection of Voyages that contributed to the eſtabliſhment of the Eaſt-India company, Vol iii. Part 1. Pag. 63.

CHAP. IX.
Of the Eſſenes.

THE Eſſenes (b) made a vow to obſerve juſtice to mankind, to do no ill to any perſon, upon whatſoever account; to keep faith with all the world, to hate injuſtice, to command with modeſty, always to ſide with truth, and to fly from all unlawful gain.

(b) Hiſt. of the Jews, by *Prideaux*.

CHAP. X.
Of the ſect of ſtoics.

THE ſeveral ſects of philoſophy amongſt the ancients, were a ſpecies of religion. Never were any principles more worthy of human nature, and more proper to form the good man, than thoſe of the ſtoics; and if I could for a moment ceaſe to think that I am a Chriſtian, I ſhould not be able to hinder

hinder myſelf from ranking the deſtruction of the ſect of Zeno, among the misfortunes that have befallen the human race. BOOK XXIV. Chap. 11.

It carried to exceſs only thoſe things in which there is true greatneſs, the contempt of pleaſure and of pain.

It was this ſect alone that made citizens; this alone that made great men; this alone great emperors.

Laying aſide for a moment revealed truths, let us ſearch through all nature, and we ſhall not find a nobler object than the Antoninus's; even Julian himſelf, Julian, (a commendation thus wreſted from me, will not render me an accomplice of his apoſtacy) no, there has not been a prince ſince his reign, more worthy to govern mankind.

While the ſtoics looked upon riches, human grandeur, grief, diſquietudes, and pleaſure, as vanity; they were entirely employed in labouring for the happineſs of mankind; and in exerciſing the duties of ſociety. It ſeems as if they regarded that ſacred ſpirit, which they believed to dwell within them, as a kind of favourable providence watchful over the human race.

Born for ſociety, they all believed that it was their deſtiny to labour for it; with ſo much the leſs fatigue, as their rewards were all within themſelves. Happy by their philoſophy alone, it ſeemed as if only the happineſs of others could increaſe theirs.

CHAP. XI.

Of contemplation.

MEN being made to preſerve, to nouriſh, to clothe themſelves, and to do all the actions of ſociety, religion ought not to give them too contemplative a life (a).

(a) This is the inconvenience of the doctrine of *Foe* and *Laockium*.

The Mahometans become ſpeculative by habit; they pray five times a day, and each time they are obliged

Book XXIV. Chap. 12. & 13.

obliged to caſt behind them every thing which has any concern with this world: this forms them for ſpeculation. Add to this that indifference for all things which is inſpired by the doctrine of unalterable fate.

If other cauſes beſides theſe concur to diſengage their affections, for inſtance, if the ſeverity of the government, if the laws concerning the property of land, give them a precarious ſpirit; all is loſt.

The religion of the Gebres formerly rendered Perſia a flouriſhing kingdom; it corrected the bad effects of deſpotic power. The ſame empire is now deſtroyed by the Mahometan religion.

CHAP. XII.
Of penance.

PEnances ought to be joined with the idea of labour, not with that of idleneſs; with the idea of good, not with that of ſuper-eminent; with the idea of frugality, not with that of avarice.

CHAP. XIII.
Of inexpiable crimes.

IT appears from a paſſage of the books of the pontiffs, quoted by Cicero (a), that they had amongſt the Romans * inexpiable crimes; and it is on this, that Zozimus founds the narration ſo proper to blacken the motives of Conſtantine's converſion; and Julian that bitter raillery on this converſion in his Cæſars.

(a) Lib. ii. of Laws.

The Pagan religion indeed, which prohibited only ſome of the groſſer crimes; which ſtopped the hand, but meddled not with the heart, might have crimes that were inexpiable: but a religion which bridles all the paſſions; which is not more jealous of

* *Sacrum commiſſum quod neque expiari poterit impiè commiſſum eſt, quod expiari poterit, publici ſacerdotes expianto.*

of actions, than of thoughts and desires; which holds us not by a few chains, but by an infinite number of threads; which, leaving human justice aside, establishes another kind of justice; which is so ordered, as to lead us continually from repentance to love, and from love to repentance; which puts between the judge and the criminal a great mediator; between the just and the mediator, a great judge; a religion like this ought not to have crimes in themselves inexpiable. But, though it gives fear and hope to all, it makes us sufficiently sensible, that there is no crime in its own nature inexpiable, though a whole criminal life may be so; that it is extremely dangerous to affront mercy, by new crimes and new expiations; that an uneasiness on account of ancient debts, from which we are never free, ought to make us afraid of contracting new ones, of filling up the measure, and going even to that point where paternal goodness is limited.

CHAP. XIV.

In what manner religion has an influence on civil laws.

AS both religion and the civil laws ought to have a peculiar tendency to render men good citizens, it is evident that when one of these deviates from this end, the tendency of the other ought to be strengthened. The less severity there is in religion, the more there ought to be in the civil laws.

Thus the reigning religion of Japan having few doctrines, and proposing neither future rewards nor punishments, the laws to supply these defects have been made with the spirit of severity, and are executed with an extraordinary punctuality.

When the doctrine of necessity is established by religion, the penalties of the laws ought to be more severe, and the magistrate more vigilant; to the end that men, who would otherwise become abandoned, might

Book XXIV. Chap. 14.

might be determined by theſe motives: but it is quite otherwiſe, where religion has eſtabliſhed the doctrine of liberty.

From the inactivity of ſoul ſprings the Mahometan doctrine of predeſtination, and from this doctrine of predeſtination ſprings the inactivity of ſoul.

This, they ſay, is in the decrees of God; they muſt therefore indulge their repoſe. In a caſe like this, the magiſtrate ought to awaken by the laws, thoſe who are lulled aſleep by religion.

When religion condemns things which the civil laws ought to permit, there is danger leſt the civil laws, on the other hand, ſhould permit what religion ought to condemn. Either of theſe is a conſtant proof of a want of true ideas of that harmony and proportion, which ought to ſubſiſt between both.

Thus the Tartars (a) of Gengiſkan, amongſt whom it was a ſin and even a capital crime to put a knife in the fire, to lean on a whip, to ſtrike a horſe with his bridle, to break one bone with another; did not believe it to be any ſin to break their word, to ſeize upon another man's goods, to do an injury to a perſon, or to commit murder. In a word, laws which render that neceſſary which is only indifferent, have this inconveniency, that they make thoſe things indifferent which are abſolutely neceſſary.

The people of Formoſa (b) believe, that there is a kind of hell; but it is to puniſh thoſe who at certain ſeaſons have not gone naked; who have dreſſed in calicoe, and not in ſilk; who have preſumed to look for oyſters, who have undertaken any buſineſs without conſulting the ſong of birds: whilſt drunkenneſs and debauchery are not regarded as crimes. They believe, even that the debauches of their children are agreeable to their gods.

When religion abſolves the mind by a thing merely accidental, it loſes its greateſt influence on mankind. The people of India believed, that the waters of the Ganges have a ſanctifying virtue (c). Thoſe who

(a) See the relation written by *John Duplan Carpin*, ſent to Tartary, by Pope Innocent IV. in the year 1246.

(b) Collection of Voyages that contributed to the eſtabliſhment of the Eaſt-India company, Vol. v. Pag. 192.

(c) Edifying Letters, Collect. 15.

who die on its banks are imagined to be exempted from the torments of the other life, and to be entitled to dwell in a region full of delights; and for this reaſon the aſhes of the dead are ſent from the moſt diſtant places to be thrown into this river. Little then does it ſignify whether they have lived virtuouſly or not, ſo they be but thrown into the Ganges.

The idea of a place of rewards has a neceſſary connection with the idea of the abodes of miſery; and when they hope for the firſt without fearing the latter, the civil laws have no longer any influence. Men who believe that they are ſure of the rewards of the other life, are above the power of the legiſlator; they look upon death with too much contempt: by what methods ſhall the man be reſtrained by laws, who believes that the greateſt pain the magiſtrate can inflict, will end in a moment to begin his happineſs?

CHAP. XV.

How falſe religions are ſometimes corrected by the civil laws.

SImplicity, ſuperſtition, or a reſpect for antiquity, have ſometimes eſtabliſhed myſteries or ceremonies ſhocking to modeſty: of this the world has furniſhed numerous examples. Ariſtotle (a) ſays, that in this caſe the law permits the fathers of families to repair to the temple to celebrate theſe myſteries for their wives and children. How admirable the civil law, which in ſpite of religion preſerves the manners untainted!

(a) Polit. Lib. vii. Cap. 17.

Auguſtus (b) excluded the youth of either ſex from aſſiſting at any nocturnal ceremony, unleſs accompanied by a more aged relation; and when he revived the *lupercalia*, he would not allow the young men to run naked.

(b) Suetonius *in Auguſto*, cap. 31.

CHAP.

CHAP. XVI.

How the laws of religion correct the inconveniencies of a political conſtitution.

Book XXIV. Chap. 16. & 17.

ON the other hand, religion may ſupport a ſtate, when the laws themſelves are incapable of doing it.

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the ſtate to remain always quiet. Among the Greeks, the Eleans, as prieſts of Apollo, enjoyed a perpetual peace. In Japan (a), the city of Meaco enjoys a conſtant peace, as being an holy city: religion ſupports this regulation, and that empire which ſeems to be the only one upon earth, that neither has nor will have any dependence on foreigners, has always in its own boſom a trade which war cannot ruin.

(a) Collection of Voyages made to eſtabliſh an India company, Vol. iv. Pag. 127.

In kingdoms where wars are not entered upon by a general conſent, and where the laws have not pointed out any means either of terminating or preventing them, religion eſtabliſhes times of peace, or ceſſation of hoſtilities, that the people may be able to ſow their corn, and perform thoſe other labours which are abſolutely neceſſary for the ſubſiſtence of the ſtate.

Every year all hoſtility ceaſes between the (b) Arabian tribes for four months; the leaſt diſturbance would then be an impiety. In former times, when every lord in France declared war or peace, religion granted a truce, which was to take place at certain ſeaſons.

(b) See *Prideaux*'s Life of Mahomet, Pag. 64.

CHAP. XVII.

The ſame ſubject continued.

WHEN a ſtate has many cauſes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery,

bery, are frequently guilty of doing injury and injuſtice. Mahomet (a) enacted this law: "*If any one forgives* * *the blood of his brother, he may purſue the malefactor for damages and intereſt: but he who ſhall injure the wicked, after having received ſatisfaction, ſhall in the day of judgment ſuffer the moſt grievous torments.*"

Book XXIV. Chap. 18.

(a) Alcoran, Book I. Chap. *of the cow.*

The Germans inherited the hatred and enmity of their near relations: but theſe were not eternal. Homicide was expiated by giving a certain number of cattle, and all the family received ſatisfaction. A thing extremely uſeful, ſays Tacitus (b), becauſe enmities are moſt dangerous amongſt a free people. I believe indeed, that their miniſters of religion who were held by them in ſo much credit, were concerned in theſe reconciliations.

(b) *De moribus Germanorum.*

Amongſt the Malais (c) where no form of reconciliation is eſtabliſhed, he who has committed murder, certain of being aſſaſſinated by the relations or friends of the deceaſed, abandons himſelf to fury, wounds and kills all he meets.

(c) Collection of Voyages that contributed to the eſtabliſhment of the Eaſt-India company, Vol. vii. Pag. 303. See alſo Memoirs of the C. de Forbin, and what he ſays of the Macaſſars.

CHAP. XVIII.

How the laws of religion have the effect of civil laws.

THE firſt Greeks were ſmall nations, frequently diſperſed, pirates at ſea, unjuſt at land, without government and without laws. The mighty actions of Hercules and Theſeus let us ſee the ſtate of that riſing people. What could religion do more than it did to inſpire them with horror againſt murder? It declared that the man who had been murdered was engaged againſt the aſſaſſin, that he would poſſeſs his mind with terror and trouble, and oblige him to yield to him the places he had frequented when alive. They could not touch the criminal nor converſe with him (e), without being defiled:

(d) Plato of Laws, lib. ix.

(e) Tragedy of Oedipus.

* On renouncing the law of retaliation.

Book XXIV. Chap. 19.

defiled: the murderer was to be expelled the city, and an expiation made for the crime (a).

(a) Plato of Laws, lib. ix.

CHAP. XIX.

That it is not ſo much the truth or falſity of a doctrine which renders it uſeful or pernicious to men in civil government, as the uſe or abuſe which is made of it.

THE moſt true and holy doctrines may be attended with the very worſt conſequences, when they are not connected with the principles of ſociety; and, on the contrary, doctrines the moſt falſe may be attended with excellent conſequences, when contrived ſo as to be connected with theſe principles.

The religion of Confucius * diſowns the immortality of the ſoul, and the ſect of Zeno did not believe it. Theſe two ſects have drawn from their bad principles conſequences, not juſt indeed, but the moſt admirable as to their influence on ſociety. Thoſe of the religion of Tao, and of Foe, believe the immortality of the ſoul; but from this ſacred doctrine they draw the moſt frightful conſequences.

The doctrine of the immortality of the ſoul falſely underſtood, has, almoſt throughout the whole world, and in every age, engaged women, ſlaves, ſubjects, friends, to murder themſelves, that they might go and ſerve in the other world the object of

* A Chineſe philoſopher reaſons thus againſt the doctrine of *Foe*. "It is ſaid in a book of that ſect, that the body is our "dwelling place, and the ſoul the immortal gueſt which lodges "there: but if the bodies of our relations are only a lodging, "it is natural to regard them with the ſame contempt we ſhould "feel for a ſtructure of earth and dirt. Is not this endeavouring to tear from the heart the virtue of love to one's own parents? This leads us even to neglect the care of the body, "and to refuſe it the compaſſion and affection ſo neceſſary for "its preſervation: hence the diſciples of Foe kill themſelves "by thouſands" *Work of an ancient Chineſe Philoſopher, in the Collection of Duhalde, Vol.* III. *pag.* 52. *Paris edit.*

of their reſpect or love in this. Thus it was in the Weſt-Indies; thus it was amongſt the Danes (a); thus it is at preſent in Japan (b), at Macaſſar (c), and many other places.

Theſe cuſtoms do not ſo directly proceed from the doctrine of the immortality of the ſoul, as from that of the reſurrection of the body, from whence they have drawn this conſequence, that after death the ſame individual will have the ſame wants, the ſame ſentiments, the ſame paſſions. In this point of view the doctrine of the immortality of the ſoul has a prodigious effect on mankind: becauſe the idea of only a ſimple change of habitation is more within the reach of the human underſtanding, and more adapted to flatter the heart, than the idea of a new modification.

It is not enough for religion to eſtabliſh a doctrine, it muſt alſo direct its influence. This the Chriſtian religion performs in the moſt admirable manner, particularly with regard to the doctrines of which we have been ſpeaking. It makes us hope for a ſtate which is the object of our belief; not for a ſtate which we have already experienced, or known: thus every article, even the reſurrection of the body, leads us to ſpiritual ideas.

(a) See Tho. Bartholin's Antiq. of the Danes.

(b) An Account of Japan, in the Collection of Voyages that contributed to eſtabliſh an Eaſt-India company.

(c) Fourbin's Memoirs.

CHAP. XX.

The ſame ſubject continued.

THE ſacred books (a) of the ancient Perſians ſay, "*If you would be holy, inſtruct your children, becauſe all the good actions which they perform, will be imputed to you.*" They adviſe them to marry betimes, becauſe children at the day of judgment will be as a bridge, over which thoſe who have none cannot paſs. Theſe doctrines tho' falſe, were extremely uſeful.

(d) Mr. Hyde.

CHAP.

CHAP. XXI.
Of the metempſychoſis.

Book XXIV. Chap 21. & 22.

THE doctrine of the immortality of the ſoul is divided into three branches, that of pure immortality, that of a ſimple change of habitation, and that of a metempſychoſis: that is, the ſyſtem of the Chriſtians, that of the Scythians, and that of the Indians. We have juſt been ſpeaking of the two firſt, and I ſhall ſay of the laſt, that as it has been well or ill explained, it has had good or bad effects. As it inſpires men with a certain horror againſt bloodſhed, very few murders are committed in the Indies; and though they ſeldom puniſh with death, yet they enjoy a perfect tranquillity.

On the other hand, women burn themſelves at the death of their husbands; it is only the innocent who ſuffer a violent death.

CHAP. XXII.
That it is dangerous for religion to inſpire an averſion for things in themſelves indifferent.

A Kind of honor eſtabliſhed in the Indies by the prejudices of religion, has made the ſeveral tribes conceive an averſion againſt each other. This honor is founded entirely on religion; theſe family diſtinctions form no civil diſtinctions; there are Indians who would think themſelves diſhonored by eating with their king.

Theſe ſorts of diſtinctions are connected with a certain averſion for other men, very different from thoſe ſentiments which ought to proceed from difference of rank; which, amongſt us, comprehend a love for inferiors.

The laws of religion ſhould never inſpire an averſion to any thing but vice, and above all they ſhould never

never estrange man from a love and tenderness for his own species. Book XXIV. Chap. 23.

The Mahometan and Indian religions embrace an infinite number of people: the Indians hate the Mahometans, because they eat cows; the Mahometans detest the Indians, because they eat hogs.

CHAP. XXIII.

Of festivals.

WHEN religion appoints a cessation from labour, it ought to have a greater regard to the necessities of mankind, than to the grandeur of the being it designs to honor.

Athens (a) was subject to great inconveniencies from the excessive number of its festivals. These powerful people, to whose decision all the cities of Greece came to submit their quarrels, could not but suffer in their affairs.

(a) Xenophon on the republic of Athens.

When Constantine ordained that the people should rest on the sabbath, he made this decree for the cities *, and not for the inhabitants of the open country; he was sensible, that labour in the cities was useful, and in the fields necessary.

For the same reason, in a country supported by commerce the number of festivals ought to be relative to this very commerce. Protestant and Catholic countries are situated † in such a manner that there is more need of labour in the former, than in the latter; the suppression of festivals is therefore more suitable to Protestant than to Catholic countries.

Dampier (b) observes, that the diversions of different nations vary greatly according to the climate. As hot climates produce a quantity of delicate fruits, the barbarians who easily find necessaries,

(b) Dampier's Voyages, Vol. II.

* Leg. 3. Cod, *de Feriis.* This law was doubtless made only for the Pagans.

† The Catholics lie more towards the south, and the Protestants towards the north.

Book XXIV. Chap. 24.

ſpend much time in diverſions. The Indians of colder countries have not ſo much leiſure, being obliged to fiſh and hunt continually; wherefore they have leſs muſic, dancing, and feſtivals. If a new religion ſhould be eſtabliſhed amongſt theſe people, it ought to have regard to this in the inſtitution of feſtivals.

CHAP. XXIV.

Of the local laws of religion.

THERE are many local laws in various religions; and when Montezuma with ſo much obſtinacy inſiſted that the religion of the Spaniards was good for their country, and his for Mexico, he did not aſſert an abſurdity; becauſe, in fact, legiſlators could never help having a regard to what nature had eſtabliſhed before them.

The opinion of the metempſychoſis is adapted to the climate of the Indies. An exceſſive heat burns (a) up all the country; they can breed but very few cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently (b); they are ſubject to many diſtempers: a law of religion which preſerves them, is therefore moſt ſuitable to the policy of the country.

(a) See Bernier's Travels, Vol. II. Pag. 137.

While the meadows are ſcorched up, rice and pulſe by the aſſiſtance of water are brought to perfection: a law of religion which permits only this kind of nouriſhment, muſt therefore be extremely uſeful to men in theſe climates.

(b) Edifying Letters, Coll. XII. Pag. 95.

The fleſh of beaſts in that country is inſipid, but the milk and butter which they receive from them ſerve for a part of their ſubſiſtence: therefore the law which prohibits the eating and killing of cows, is in the Indies not unreaſonable.

Athens contained a prodigious multitude of people, but its territory was barren. It was therefore a religious maxim with this people, that thoſe who offered

fered ſome ſmall preſents to the gods (a), honored them more than thoſe who ſacrificed an ox.

(a) *Euripides* in *Athenæus*. lib. ii.

CHAP. XXV.

The inconveniency of tranſplanting a religion from one country to another.

IT follows from hence, that there are frequently many inconveniencies attending the tranſplanting a religion from one country to another.

"*The hog*, ſays Mr. de Boulainvilliers (b), *muſt* "*be very ſcarce in Arabia, where there are almoſt* "*no woods, and hardly any thing fit for the nouriſh-*"*ment of theſe animals; beſides, the ſaltneſs of the* "*water and food renders the people moſt ſuſceptible* "*of cutaneous diſorders.*" This local law could not be good in other * countries, where the hog is almoſt an univerſal, and in ſome ſort a neceſſary nouriſhment.

(b) Life of Mahomet.

I ſhall here make a reflection. Sanctorius has obſerved that pork tranſpires but little (c), and that this kind of meat greatly hinders the tranſpiration of other food; he has found that this diminution amounts to a third (d). Beſides it is known, that the want of tranſpiration forms or increaſes the diſorders of the ſkin. The feeding on pork ought therefore to be prohibited, in climates where the people are ſubject to theſe diſorders, as in Paleſtine, Arabia, Ægypt, and Lybia.

(c) Medicina Statica, Sect. 3. Aphor. 22.

(d) Ibid.

CHAP. XXVI.

The ſame ſubject continued.

SIR John Chardin (e) ſays, there is not a navigable river in Perſia, except the Kur, which is at the extremity of the empire. The ancient law of the Gebres which prohibited ſailing on rivers, was not therefore attended with any inconvenience in

(e) Travels into Perſia, Vol. II.

* As in China.

Book XXIV. Chap. 26.

this country, though it would have ruined the trade of another.

Frequent bathings are extremely uſeful in hot climates. On this account they are ordained in the Mahometan law, and in the Indian religion. In the Indies it is a moſt meritorious act to pray to (a) God in the running ſtream: but how could theſe things be performed in other climates?

(a) Bernier's Travels, Vol. II.

When a religion adapted to the climate of one country claſhes too much with the climate of another, it cannot be there eſtabliſhed; and whenever it has been introduced, it has been afterwards diſcarded. It ſeems to all human appearance, as if the climate had preſcribed the bounds of the Chriſtian and the Mahometan religions.

It follows from hence, that it is almoſt always proper for a religion to have particular doctrines, and a general worſhip. In laws concerning the practice of religious worſhip, there ought to be but few particulars: for inſtance, they ſhould command mortification in general, and not a certain kind of mortification. Chriſtianity is full of good ſenſe: abſtinence is of divine inſtitution; but a particular kind of abſtinence is ordained by a political law, and therefore may be changed.

BOOK XXV.

Of laws as relative to the eſtabliſhment of religion and its external polity.

CHAP. I.

Of religious ſentiments.

Book XXV. Chap. 1.

THE pious man and the atheiſt always talk of religion; the one ſpeaks of what he loves, and the other of what he fears.

CHAP.

CHAP. II.

Of the motives of Attachment to different religions.

THE different religions of the world do not give to those who profess them equal motives of attachment: this depends greatly on the manner in which they agree with the turn of thought and perceptions of mankind.

We are extremely addicted to idolatry, and yet have no great inclination for the religion of idolaters: we are not very fond of spiritual ideas, and yet are most attached to those religions which teach us to adore a spiritual being. This proceeds from the satisfaction we find in ourselves at having been so intelligent as to chuse a religion, which raises the deity from that baseness in which he had been placed by others. We look upon idolatry as the religion of an ignorant people; and the religion which has a spiritual being for its object, as that of the most enlightened nations.

When with the doctrine that gives us the idea of a spiritual supreme being, we can still join those of a sensible nature, and admit them into our worship, we contract a greater attachment to religion; because those motives which we have just mentioned, are added to our natural inclination for the objects of sense. Thus the Catholics, who have more of this kind of worship than the Protestants, are more attached to their * religion, than the Protestants are to theirs.

When the (a) people of Ephesus were informed that the fathers of the council had declared they might call the holy virgin the *mother of God*, they were transported with joy, they kissed the hands of the bishops, they embraced their knees, the whole city resounded with acclamations.

(a) St. Cyril's Letter.

* They are more zealous for its propagation.

BOOK XXV. Chap. 2.

When an intellectual religion ſuperadds a choice made by the deity, and a preference of thoſe who profeſs it to thoſe who do not, this greatly attaches us to that religion. The Mahometans would not be ſuch good Muſſulmans, if on the one hand there were not idolatrous nations who make them imagine themſelves the champions of the unity of God; and on the other, Chriſtians to make them believe that they are the objects of his preference.

A religion burthened with many * ceremonies, attaches us to it more ſtrongly than that which has a fewer number. We have an extreme propenſity to things in which we are continually employed: witneſs the obſtinate prejudices of the † Mahometans and the Jews; and the readineſs with which thoſe barbarous and ſavage nations change their religion, who, as they are employed entirely in hunting, or war, have but few religious ceremonies.

Men are extremely inclined to the paſſions of hope and fear; a religion therefore, that had neither a heaven nor an hell, could hardly pleaſe them. This is proved by the eaſe with which foreign religions have been eſtabliſhed in Japan, and the zeal and fondneſs with which they were received §.

In order to raiſe an attachment to religion, it is neceſſary that it ſhould inculcate pure morals. Men who are knaves by retail, are extremely honeſt in the groſs, they love morality. And were I not treating of ſo grave a ſubject, I ſhould ſay that this appears remarkably evident in our theatres: we are

* This does not contradict what I have ſaid in the laſt chapter of the preceding book: I here ſpeak of the motives of attachment to religion, and there of the means of rendering it more general.

† This has been remarked by the whole world. See as to the Turks, the miſſions of the Levant; the Collection of Voyages that contributed to the eſtabliſhment of an Eaſt-India company, Vol. iii. pag. 201. On the Moors of Batavia, and Father Labat on the Mahometan negroes, *&c.*

§ The Chriſtian and the Indian religions; theſe have an hell and a paradiſe, which the religion of *Sintos* has not.

are ſure of pleaſing the people by ſentiments avowed by morality; we are ſure of ſhocking them by thoſe it diſapproves.

When external worſhip is attended with great magnificence, it flatters our minds, and ſtrongly attaches us to religion. The riches of temples, and thoſe of the clergy, greatly affect us. Thus even the miſery of the people, is a motive that renders them fond of that religion, which has ſerved as a pretext to thoſe who were the cauſe of their miſery.

CHAP. III.

Of temples.

ALmoſt all civilized nations dwell in houſes: from hence naturally aroſe the idea of building an houſe for God, in which they might adore and ſeek him amidſt all their hopes and fears.

In fact, nothing is more comfortable to mankind, than a place in which they may find the deity peculiarly preſent, and where they may aſſemble together to confeſs their weakneſs and tell their griefs.

But this natural idea never occurred to any but ſuch as cultivated the land; thoſe who had no houſes for themſelves were never known to build temples.

This was the cauſe that made Gengiſkan diſcover ſuch a prodigious contempt for moſques*. This prince † examined the Mahometans, he approved of all their doctrines, except that of the neceſſity of going to Mecca: he could not comprehend why God might not every where be adored. As the Tartars did not dwell in houſes, they could have no idea of temples.

* Entering the Moſque of Buchara, he took the Alcoran, and threw it under his horſe's feet. *Hiſt. of the Tartars*, p. 273.

† Ibid. pag. 342.

Book XXV. Chap. 3.

Thoſe people who have no temples, have but a ſmall attachment to their own religion. This is the reaſon why the Tartars have in all times given ſo great a toleration *; why the barbarous nations who conquered the Roman empire, did not heſitate a moment to embrace Chriſtianity; why the ſavavages of America have ſo little fondneſs for their own religion; why ſince our miſſionaries have built churches in Paraguay, the natives of that country are become ſo zealous for ours.

As the deity is the refuge of the unhappy, and none are more unhappy than criminals, men have been naturally led to think temples an aſylum for thoſe wretches. This idea appeared ſtill more natural to the Greeks, where murderers, chaſed from their city and the preſence of men, ſeemed to have no houſes but the temples, nor other protectors but the gods.

At firſt theſe were only deſigned for involuntary homicides; but when the people made them a ſanctuary for great criminals, they fell into a groſs contradiction. If they had offended men, they had much greater reaſon to believe that they had offended the gods.

Theſe aſylums multiplied in Greece. The temples, ſays Tacitus (a), were filled with inſolvent debtors, and wicked ſlaves; the magiſtrate found it difficult to exerciſe his office, the people protected the crimes of men as the ceremonies of the gods; at length the ſenate was obliged to retrench a great number of them.

(a) Annal. lib. ii.

The laws of Moſes were perfectly wiſe. The man who involuntarily killed another, was innocent; but he was obliged to be taken away from before the eyes of the relations of the deceaſed: Moſes therefore appointed an aſylum (b) for ſuch unfortunate people.

(b) Numb. xxxv.

* This diſpoſition of mind has been communicated to the Japaneſe, who, as is eaſily proved, derive their original from the Tartars.

people. Great criminals deſerved not a place of ſafety, and they had none (a): the Jews had only a portable tabernacle, which continually changed its place: this excluded the idea of a ſanctuary. It is true that they had afterwards a temple; but the criminals who would reſort thither from all parts, might diſturb the divine ſervice. If perſons who had committed manſlaughter, had been driven out of the country, as was cuſtomary amongſt the Greeks, they had reaſon to fear that they would worſhip ſtrange gods. All theſe conſiderations made them eſtabliſh cities of ſafety, where they might ſtay till the death of the high-prieſt.

Book XXV. Chap. 4.

(a) Ibid.

CHAP. IV.

Of the miniſters of religion.

THE firſt men, ſays Pophyry, ſacrificed only vegetables. In a worſhip ſo ſimple, every one might be a prieſt in his own family.

The natural deſire of pleaſing the deity, multiplied ceremonies. From hence it followed, that men employed in agriculture became incapable of obſerving them all, and of filling up the number.

Particular places were conſecrated to the gods; it then became neceſſary that they ſhould have miniſters to take care of them; in the ſame manner as every citizen took care of his houſe and domeſtic affairs. Hence the people who have no prieſts, are commonly barbarians: ſuch were formerly the Pedalians (b), ſuch are ſtill the Wolguſky *.

(b) Lilius Giraldus, pag. 726.

Men conſecrated to the deity ought to be honored, eſpecially amongſt people who have formed an idea of a perſonal purity neceſſary to approach the places moſt agreeable to the gods, and for the performance of particular ceremonies.

The

* A people of Siberia. See the account given by Mr. *Everard Yſbrant-Ides*, in the Collection of Travels to the North, Vol. viii.

Book XXV. Chap. 5.

The worſhip of the gods requiring a continual application, moſt nations were led to conſider the clergy as a ſeparate body. Thus amongſt the Egyptians, the Jews, and the Perſians (a), they conſecrated to the deity certain families who performed and perpetuated the ſervice. There have been even religions, which have not only eſtranged eccleſiaſtics from buſineſs, but have alſo taken away the embaraſſments of a family; and this is the practice of the principal branch of Chriſtianity.

(a) See Mr. Hyde.

I ſhall not here treat of the conſequences of the law of celibacy: it is evident, that it may become hurtful, in proportion as the body of the clergy may be too numerous; and, in conſequence of this, that of the laity too ſmall.

By the nature of the human underſtanding, we love in religion every thing which carries the idea of difficulty; as in point of morality we have a ſpeculative fondneſs for every thing which bears the character of ſeverity. Celibacy has been moſt agreeable to thoſe nations to whom it ſeemed leaſt adapted, and with whom it might be attended with the moſt fatal conſequences. In the ſouthern countries of Europe, where, by the nature of the climate, the law of celibacy is more difficult to obſerve, it has been retained; in thoſe of the north, where the paſſions are leſs lively, it has been baniſhed. Moreover, in countries where there are but few inhabitants, it has been admitted; in thoſe that are vaſtly populous, it has been rejected. 'Tis obvious, that theſe reflections relate only to the too great extenſion of celibacy, and not to celibacy itſelf.

CHAP. V.

Of the bounds which the laws ought to preſcribe to the riches of the clergy.

AS particular families may be extinct, their wealth cannot be a perpetual inheritance. The clergy

is a family which cannot be extinct; wealth is therefore fixed to it for ever, and cannot go out of it.

Particular families may increaſe, it is neceſſary then that their wealth ſhould alſo increaſe. The clergy is a family, which ought not to increaſe; their wealth ought then to be limited.

We have retained the regulations of the Levitical laws as to the poſſeſſions of the clergy, except thoſe relating to the bounds of theſe poſſeſſions: indeed, amongſt us we muſt ever be ignorant of the bound, beyond which any religious community can no longer be permitted to acquire.

Theſe endleſs acquiſitions appear to the people ſo unreaſonable, that he who ſhould ſpeak in their defence, would be regarded as an idiot.

The civil laws find ſometimes many difficulties in altering eſtabliſhed abuſes; becauſe they are connected with things worthy of reſpect: in this caſe an indirect proceeding would be a greater proof of the wiſdom of the legiſlator, than another which ſtruck directly at the thing itſelf. Inſtead of prohibiting the acquiſitions of the clergy, we ſhould ſeek to give them a diſtaſte for them; to leave them the right, and to take away the deed.

In ſome countries of Europe, a reſpect for the privileges of the nobility has eſtabliſhed in their favour a right of indemnity over immoveable goods acquired in mortmain. The intereſt of the prince has in the ſame caſe made him exact a right of amortization. In Caſtile, where there is no ſuch right, the clergy have ſeized upon every thing. In Arragon, where there is ſome right of amortization, they have obtained leſs: in France, where this right and that of indemnity are eſtabliſhed, they have acquired leſs ſtill; and it may be ſaid, that the proſperity of this kingdom is partly owing to the exerciſe of theſe two rights. If poſſible then, increaſe theſe rights, and put a ſtop to the mortmain.

Render

Book XXV. Chap. 6. & 7.

Render the ancient and neceſſary patrimony of the clergy ſacred and inviolable; let it be fixt and eternal like that body itſelf: but let new inheritances be out of their power.

Permit them to break the rule, when the rule is become an abuſe; ſuffer the abuſe when it enters into the rule.

They ſtill remember at Rome, a certain memorial ſent thither on ſome diſputes with the clergy, in which was this maxim: "*The clergy ought to contribute to the expences of the ſtate, let the Old Teſtament ſay what it will.*" They concluded from this paſſage, that the author of this memorial was better verſed in the language of the tax-gatherers, than in that of religion.

CHAP. VI.
Of monaſteries.

THE leaſt degree of common-ſenſe will let us ſee, that bodies deſigned for a perpetual continuance, ſhould not be allowed to ſell their funds for life, nor to borrow for life; unleſs we want them to be heirs to all thoſe who have no relations, and to thoſe who do not chuſe to have any. Theſe men play againſt the people, but they hold the bank themſelves.

CHAP. VII.
Of the luxury of ſuperſtition.

"*THOSE are guilty of impiety towards the gods,*" ſays Plato (a), "*who deny their exiſtence, or who, while they believe it, maintain that they do not interfere with what is done below; or, in ſhort, who think that they can eaſily appeaſe them by ſacrifices: three opinions equally pernicious.*" Plato has here ſaid all that the cleareſt light of nature has ever been able to ſay, in point of religion.

(a) Of Laws, Book X.

The

The magnificence of external worſhip has a principal connection with the conſtitution of the ſtate. In good republics, they have curbed not only the luxury of vanity, but even that of ſuperſtition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon, many of thoſe of Plato on funerals adopted by Cicero; and, in fine, ſome of the laws of Numa * on ſacrifices.

Birds, ſays Cicero, and paintings begun and finiſhed in a day, are gifts the moſt divine. We offer common things, ſays a Spartan, that we may always have it in our power to honor the gods.

The deſire of man to pay his worſhip to the deity, is very different from the magnificence of this worſhip. Let us not offer our treaſures to him, if we are not proud of ſhewing that we eſteem what he would have us deſpiſe.

"*What muſt the gods think of the gifts of the impious*, ſaid the admirable Plato, *when a good man would bluſh to receive preſents from a villain?*"

Religion ought not under the pretence of gifts to draw from the people, what the neceſſities of the ſtate have left them: but, as Plato (a) ſays, "*The chaſte and the pious ought to offer gifts, which reſemble themſelves.*"

(a) On Laws, lib. ii.

Nor is it proper for religion to encourage expenſive funerals. What is there more natural, than to take away the difference of fortune in a circumſtance, and in the very moment, which equals all fortunes?

CHAP. VIII.

Of the pontificate.

WHEN religion has many miniſters, it is natural for them to have a chief, and for a ſovereign pontiff to be eſtabliſhed. In monarchies, where the ſeveral orders of the ſtate cannot be kept too diſtinct, and where all powers ought not to be lodged

* *Rogum vino ne reſpergito.* Law of the twelve Tables.

BOOK XXV. Chap. 9.

lodged in the ſame perſon; it is proper that the pontificate be diſtinct from the empire. The ſame neceſſity is not to be met with in a deſpotic government, the nature of which is to unite all the different powers in the ſame perſon. But in this caſe it may happen, that the prince may regard religion as he does the laws themſelves, as dependent on his own will. To prevent this inconveniency, there ought to be monuments of religion, for inſtance, ſacred books, which fix and eſtabliſh it. The king of Perſia is the chief of the religion; but this religion is regulated by the alcoran. The emperor of China is the ſovereign pontiff; but there are books in the hands of every body, to which he himſelf muſt conform. In vain a certain emperor attempted to aboliſh them; they triumphed over tyranny.

CHAP. IX.

Of toleration in point of religion.

WE are here politicians, and not divines: but the divines themſelves muſt allow that there is a great difference between tolerating and approving a religion.

When the legiſlator has believed it a duty to permit the exerciſe of many religions, it is neceſſary that it ſhould inforce alſo a toleration amongſt theſe religions themſelves. It is a principle that every religion which is perſecuted, becomes itſelf perſecuting: for as ſoon as by ſome accidental turn it ariſes from perſecution, it attacks the religion which perſecuted it; not as a religion, but as a tyranny.

It is neceſſary then that the laws require from the ſeveral religions, not only that they ſhall not embroil the ſtate, but that they ſhall not raiſe diſturbances amongſt themſelves. A citizen does not fulfil the laws, by not diſturbing the government; it is requiſite, that he ſhould not trouble any citizen whomſoever.

CHAP.

CHAP. X.

The ſame ſubject continued.

AS there are ſcarce any but perſecuting religions that have an extraordinary zeal for being eſtabliſhed in other places (becauſe a religion that can tolerate others ſeldom thinks of its own propagation), it muſt therefore be a very good civil law, when the ſtate is already ſatisfied with the eſtabliſhed religion, not to ſuffer the eſtabliſhment of another.

This is then a fundamental principle of the political laws of religion: That when the ſtate is at liberty to receive or to reject a new religion, it ought to be rejected; when it is received, it ought to be tolerated.

CHAP. XI.

Of changing a religion.

A Prince who undertakes to deſtroy or to change the eſtabliſhed religion of his kingdom, muſt greatly expoſe himſelf. If his government is deſpotic, he runs the riſk of ſeeing a revolution, which from ſome kind of tyranny or other is no new thing in ſuch ſtates. The cauſe of this revolution is, that a ſtate cannot change its religion, manners, and cuſtoms in an inſtant, and with the ſame rapidity as the prince publiſhes the ordinance which eſtabliſhes a new religion.

Beſides, the ancient religion is connected with the conſtitution of the kingdom, and the new one is not: the former agrees with the climate, and very often the new one is oppoſite to it. Moreover, the citizens, diſguſted with their laws, look upon the government already eſtabliſhed with contempt; they conceive a jealouſy againſt the two religions, inſtead of a firm belief in one; and in a word, theſe revolutions

Book XXV. Chap. 12.

lutions give the ſtate, at leaſt for ſome time, both bad citizens, and bad believers.

CHAP. XII.

Of penal laws.

PEnal laws ought to be avoided, in reſpect to religion; they imprint fear, it is true; but as religion has alſo penal laws which inſpire fear, the one is effaced by the other: and between theſe two different kinds of fear, the mind becomes hardened.

The threatenings of religion are ſo terrible, and its promiſes ſo great, that when they actuate the mind, whatever efforts the magiſtrates may uſe to oblige us to renounce it, they ſeem to leave us nothing when they deprive us of the exerciſe of our religion; and to bereave us of nothing, when we are freely allowed to profeſs it.

It is not therefore in filling the ſoul with this great object, in haſtening its approach to that important moment in which it ought to be of the higheſt importance, that they can ſucceed in detaching the ſoul from it. A more certain way is to attack religion by favours, by the conveniencies of life, by hopes of fortune; not by that which revives, but by that which extinguiſhes, the ſenſe of its duty; not by that which ſhocks it, but by that which throws it into indifference, at the time when other paſſions actuate our minds, and thoſe which religion inſpires are huſhed into ſilence. A general rule in changing a religion; the invitations ſhould be much ſtronger than the penalties.

The temper of the human mind has appeared even in the nature of the puniſhments they have employed. If we take a ſurvey of the perſecutions in Japan (a), we ſhall find that they were more ſhocked at cruel torments than at long ſufferings, which rather weary than affright; which are the more difficult to ſurmount from their appearing leſs difficult.

(a) In the Collection of Voyages that contributed to the eſtabliſhment of an Eaſt-India company, Vol. 5.

In

In a word, hiſtory ſufficiently informs us, that penal laws have never had any other effect but to deſtroy. Book XXV. Chap. 13.

CHAP. XIII.

A moſt humble remonſtrance to the inquiſitors of Spain *and* Portugal.

A Jeweſs of ten years of age, who was burnt at Liſbon at the laſt *Auto-da-fé*, gave occaſion to the following little piece; the moſt idle, I believe, that ever was wrote. When we attempt to prove things ſo evident, we are ſure never to convince.

The author declares, that though a Jew, he has a reſpect for the Chriſtian religion; and that he ſhould be glad to take away from the princes who are not Chriſtians, a plauſible pretence for perſecuting this religion.

"You complain, ſays he to the inquiſitors, that "the emperor of Japan cauſed all the Chriſtians in "his dominions to be burnt by a ſlow fire. But he "will anſwer, we treat you who do not believe like "us, as you yourſelves treat thoſe who do not be-"lieve like you: you can only complain of your "weakneſs, which has hindered you from exter-"minating us, and which has enabled us to exter-"minate you.

"But it muſt be confeſſed, that you are much "more cruel than this emperor. You put us to "death, who believe only what you believe, be-"cauſe we do not believe *all* that you believe. We "follow a religion, which you yourſelves know to "have been formerly dear to God. We think that "God loves it ſtill, and you think that he loves it "no more: and becauſe you judge thus, you make "thoſe ſuffer by ſword and fire, who hold an er-"ror ſo pardonable as to believe that God * ſtill "loves what he once loved.

"If

* The ſource of the blindneſs of the Jews is, their not perceiving that the œconomy of the goſpel is in the order of the

Book XXV. Chap. 13.

" If you are cruel to us, you are much more ſo " to our children; you cauſe them to be burnt, be- " cauſe they follow the inſpirations given them by " thoſe whom the law of nature, and the laws of " all nations teach them to regard as gods.

" You deprive yourſelves of the advantage you " have over the Mahometans, with reſpect to the " manner in which their religion was eſtabliſhed. " When they boaſt of the number of their believers, " you tell them that they have obtained them by " violence, and that they have extended their reli- " gion by the ſword: why then do you eſtabliſh " yours by fire?

" When you would bring us over to you, we " object a ſource from which you glory to deſcend. " You reply to us, that though your religion is " new, it is divine; and you prove it from its " growing amidſt the perſecution of Pagans, and " by the blood of your martyrs: but at preſent " you play the part of the Dioclefians, and make " us take yours.

" We conjure you, not by the mighty God whom " both you and we ſerve, but by that Chriſt who, " you tell us, took upon him a human form, to " propoſe himſelf as an example for you to fol- " low; we conjure you to behave to us, as he him- " ſelf would behave was he upon earth. You " would have us be Chriſtians, and you will not be " ſo yourſelves.

" But if you will not be Chriſtians, be at leaſt " men: treat us as you would, if having only the " weak light of juſtice which nature beſtows, you " had not a religion to conduct, and a revelation to " enlighten you.

" If heaven has had ſo great a love for you, as to " make you ſee the truth, you have received a great " favour: but is it for children who have received the

decrees of God; and that it is in this light a conſequence of his immutability itſelf.

" the inheritance of their father, to hate thoſe who " have not?

" If you have this truth, hide it not from us by " the manner in which you propoſe it. The cha- " racteriſtic of truth is its triumph over the heart " and mind, and not that impotency which you " confeſs, when you would force us to receive it by " your tortures.

" If you were juſt, you would not put us to " death for no other reaſon, but becauſe we are un- " willing to deceive you. If your Chriſt is the ſon " of God, we hope he will reward us for being ſo " unwilling to profane his myſteries; and we be- " lieve, that the God whom both you and we ſerve, " will not puniſh us for having ſuffered death for a " religion which he formerly gave us, only becauſe " we believe that he ſtill continues to give it.

" You live in an age in which the light of nature " ſhines more bright than it has ever done; in which " philoſophy has enlightened the human underſtand- " ing; in which the morality of your goſpel has " been more known; in which the reſpective rights " of mankind, with regard to each other, and the " empire which one conſcience has over another, " are beſt underſtood. If you do not therefore " ſhake off your ancient prejudices, which whilſt " unregarded, mingle with your paſſions, it muſt " be confeſſed, that you are incorrigible, incapable " of any degree of light, or inſtruction; and a na- " tion muſt be very unhappy that gives authority " to ſuch men.

" Would you have us frankly tell you our " thoughts? You conſider us rather as your ene- " mies, than as the enemies of your religion: for " if you loved your religion, you would not ſuffer " it to be corrupted by ſuch groſs ignorance.

" It is neceſſary that we ſhould advertiſe you of " one thing, that is, if any one in times to come " ſhall dare to aſſert, that in the age in which we

Book XXV. Chap. 14, & 15.

"live the people of Europe were civilized, you will "be cited to prove that they were barbarians; and "the idea they will have of you, will be such as "will diſhonor your age, and ſpread hatred over "all your contemporaries."

CHAP. XIV.

Why the Chriſtian religion is ſo odious in Japan.

(a) Book vi. Chap. 24.

WE have already mentioned (a) the perverſe turn of the minds of the people of Japan. The magiſtrates conſidered the firmneſs which Chriſtianity inſpires, when they attempted to make the people renounce their faith, as in itſelf moſt dangerous: they fancied that it increaſed their obſtinacy. The law of Japan puniſhes ſeverely the leaſt diſobedience. They ordered them to renounce the Chriſtian religion: they did not renounce it, this was diſobedience: they puniſhed this crime, and the continuance in diſobedience ſeemed to deſerve another puniſhment.

Puniſhments amongſt the Japaneſe are conſidered as the revenge of an inſult done to the prince. The ſongs of triumph ſung by our martyrs appeared as an outrage againſt him; the title of martyr provoked the magiſtrates; in their opinion it ſignified rebel: they did all in their power to prevent their obtaining it. It was then that their ſouls were exaſperated, and a horrid ſtruggle was ſeen between the tribunals that condemned, and the accuſed who ſuffered; between the civil laws, and thoſe of religion.

CHAP. XV.

Of the propagation of religion.

ALL the people of the eaſt, except the Mahometans, believe all religions in themſelves indifferent. They fear the eſtabliſhment of another religion, no otherwiſe than as a change in government. Amongſt the Japaneſe, where there are many

many ſects, and where the ſtate has had for ſo long a time an eccleſiaſtic ſuperior, they (a) never diſpute on religion. It is the ſame with the people of Siam (b). The Calmucks (c) do more, they make it a point of conſcience to tolerate every ſpecies of religion: at Calicut (d) it is a maxim of the ſtate, that every religion is good.

Book XXV. Chap. 15.

(a) See Kempfer.
(b) Fourbin's Memoirs.
(c) Hiſtory of the Tartars, part 5.
(d) Pirard's Travels, chap. 27.

But it does not follow from hence, that a religion brought from a far diſtant country, and quite different in climate, laws, manners, and cuſtoms, will have all the ſucceſs to which its holineſs might entitle it. This is more particularly true in great deſpotic empires: here ſtrangers are tolerated at firſt, becauſe there is no attention given to what does not ſeem to ſtrike at the authority of the prince: they are entirely immerſed in ignorance. An European may render himſelf agreeable, by the knowledge he communicates: this is very well in the beginning. But as ſoon as he has any ſucceſs, when diſputes ariſe, when men who have ſome intereſt become informed of it; as their empire by its very nature, above all things requires tranquillity, and as the leaſt diſturbance may overturn it, they at firſt proſcribe the new religion and thoſe who preach it; diſputes between the preachers breaking out, they begin to entertain a diſtaſte for a religion on which even thoſe who propoſe it are not agreed.

BOOK XXVI.

Of laws as relative to the order of things on which they determine.

CHAP. I.

Idea of this book.

MEN are governed by ſeveral kinds of laws; by the law of nature; by the divine law, which is that of religion; by eccleſiaſtical, otherwiſe

Book XXVI. Chap. 1.

Book XXVI. Chap. 2.

called canon law, which is that of religious polity; by the law of nations, which may be conſidered as the civil law of the univerſe, in which ſenſe every nation is a citizen; by the general political law, whoſe object is that human wiſdom which has been the foundation of all ſocieties; by the law of conqueſt founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every ſociety, by which a citizen may defend his poſſeſſions and his life, againſt the attacks of any other citizen; in fine, by domeſtic law, which proceeds from a ſociety's being divided into ſeveral families, all which have need of a particular government.

There are therefore different orders of laws, and the ſublimity of human reaſon conſiſts in perfectly knowing to which of theſe orders the things that are to be determined ought to have a principal relation, and not to throw into confuſion thoſe principles which ſhould govern mankind.

CHAP. II.

Of laws divine and human.

WE ought not to decide by the divine laws, what ſhould be decided by human laws; nor determine by human, what ſhould be determined by divine laws.

Theſe two ſorts of laws differ in their original, in their object, and in their nature.

It is univerſally acknowledged, that human laws are in their own nature different from thoſe of religion, and this is an important principle: but this principle is itſelf ſubject to others, which muſt be enquired after.

1. It is in the nature of human laws to be ſubject to all the accidents which can happen, and to vary in proportion as the will of man changes: on the contrary, by the nature of the laws of religion, they are never

never to vary. Human laws appoint for the good; those of religion for the better: the good may have another object, because there are many kinds of good: but the better is but one, it cannot therefore change. We may change laws, because they are reputed no more than good; but the institutions of religion are always supposed to be the best. Book XXVI. Chap. 3.

2. There are kingdoms, in which the laws are of no value, as they depend only on the capricious and fickle humour of the sovereign. If in these kingdoms the laws of religion were of the same nature as the human laws, the laws of religion too would be of no value. It is however necessary to the society, that it should have something fixed; and 'tis religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws, from their being feared. Antiquity suits with religion, because we have frequently a firmer belief of things in proportion to their distance: for we have no ideas annexed to them drawn from those times, which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

CHAP. III.

Of civil laws contrary to the law of nature.

IF a slave, says Plato (a), defends himself, and kills a freeman, he ought to be treated as a parricide. This is a civil law which punishes self-defence, tho' dictated by nature.

(a) Lib. ix. on Laws.

The law of Henry VIII. which condemned a man, without being confronted by witnesses, was contrary to self-defence. In fact, in order to pass sentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that

Book XXVI. Chap. 3.

this man be at liberty to ſay, I am not the perſon you mean.

The law paſſed under the ſame reign, which condemned every woman who having carried on a criminal commerce did not declare it to the king before her marriage, violated the regard due to natural modeſty. It is as unreaſonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life.

The law of Henry II. which condemned the woman to death who loſt her child, in caſe ſhe did not make known her pregnancy to the magiſtrate, was not leſs contrary to ſelf-defence. It would have been ſufficient to oblige her to inform one of her neareſt relations, who might watch over the preſervation of the infant.

(a) A law of the Burgundians, tit. 47.

Gundebald (a) king of Burgundy decreed, that if the wife or ſon of a perſon guilty of robbery did not reveal the crime, they were to become ſlaves. This law was contrary to nature: a wife to inform againſt her huſband! a ſon to accuſe his father! to avenge one criminal action, they ordained another ſtill more criminal.

There has been much talk of a law in * England, which permitted girls at ſeven years of age to chuſe a huſband. This law was ſhocking two ways, it had no regard to the time when nature gives maturity to the underſtanding, nor to the time when ſhe gives maturity to the body.

(b) See Law 5. in the code *de repudiis & judicio de moribus ſublata.*

Amongſt the Romans, a father might oblige his daughter to repudiate (b) her huſband, though he himſelf had conſented to the marriage. But it is contrary to nature, for the divorce to be in the power of a third perſon.

A divorce can be agreeable to nature, only when it is by conſent of the two parties, or at leaſt of one of them; but when neither conſents, it is a monſtrous kind

* Mr. Bayle, in his Criticiſm on the Hiſtory of Calviniſm, ſpeaks of this law. pag. 263.

kind of divorce. In ſhort the power of divorcement can be given only to thoſe who feel the inconveniencies of marriage, and who are ſenſible of the moment when it is for their intereſt to make them ceaſe. Book XXVI. Chap. 4, & 5.

CHAP. IV.

The ſame ſubject continued.

THE law of (a) Receſſuinthus permits the children of the adulterous woman, or thoſe of her husband, to accuſe her, and to put the ſlaves of the houſe to the torture. How iniquitous the law, which to preſerve a purity of morals overturns nature, the origin, the ſource of all morality!

(a) In the code of the Viſigoths, lib. iii. tit. 4. §. 13.

With pleaſure we behold in our theatres a young hero expreſs as much horror againſt the diſcovery of his mother-in-law's guilt, as againſt the guilt itſelf. In his ſurpriſe, though accuſed, judged, condemned, proſcribed, and covered with infamy; he ſcarcely dares to reflect on the abominable blood from which Phædra ſprang: he abandons all that is moſt dear, the moſt tender object, all that lies neareſt his heart, all that can fill him with rage, to deliver himſelf up to the unmerited vengeance of the gods. It is nature's voice, the ſweeteſt of all vocal ſounds that inſpires us with this pleaſure.

CHAP. V.

Caſes in which we may judge by the principles of the civil law in limiting the principles of the law of nature.

AN Athenian law obliged * children to provide for their fathers, when fallen into poverty; it excepted thoſe who were born of a (b) courtezan, thoſe whoſe chaſtity had been infamouſly proſtituted by their father, and thoſe to whom he (c) had not given any means of gaining a livelihood.

(b) Plutarch's life of Solon.

(c) Plutarch's life of Solon, and *Gallienus* in exhort. ad art. c. 8.

The

* Under pain of infamy, another under pain of impriſonment.

Book XXVI. Chap. 6.

The law conſidered that in the firſt caſe the father being uncertain, he had rendered the natural obligation precarious; that in the ſecond, he had ſullied the life he had given, and done the greateſt injury he could do to his children, in depriving them of their reputation; that in the third, he had rendered inſupportable a life which had no means of ſubſiſtence. The law ſuſpended the natural obligation of children, becauſe the father had violated his: it looked upon the father and the ſon as no more than two citizens, and determined in reſpect to them only from civil and political views; ever conſidering, that a good republic ought to have a particular regard to manners.

CHAP. VI.

That the order of ſucceſſion or inheritance depends on the principles of political and civil law, and not on thoſe of the law of nature.

THE Voconian law ordained, that no woman ſhould be left heireſs to an eſtate, not even if ſhe was an only child. Never was there a law, ſays St. Auguſtine (a), more unjuſt. A formula of Marculfus (b) treats that cuſtom as impious, which deprives daughters of the right of ſucceeding to the eſtate of their fathers. Juſtinian (c) gives the appellation of barbarous, to the right which the males had formerly of ſucceeding in prejudice to the daughters. Theſe notions proceed from their having conſidered the right of children to ſucceed to their fathers poſſeſſions, as a conſequence of the law of nature, which it is not.

(a) *De civitate Dei*, lib. iii.

(b) Lib. ii. Chap. 12.

(c) Novel 21.

The law of nature ordains, that fathers ſhall provide for their children; but it does not oblige them to make them their heirs. The diviſion of property, the laws of this diviſion, the ſucceſſion after the death of the perſon who has had this diviſion, can be

be regulated only by the community, and consequently by political and civil laws. BOOK XXVI. Chap. 6.

True it is, that a political or civil order frequently demands, that children ſhould ſucceed to their father's eſtate; but it does not always make this neceſſary.

There may be ſome reaſons given why the laws of our fiefs appoint that the eldeſt of the males, or the neareſt relations of the male ſide ſhould have all, and the females nothing: and why by the laws of the Lombards (a) the ſiſters, the natural children, the other relations; and, in their default, the treaſury might ſhare the inheritance with the daughters.

(a) Lib. ii. tit. 14. §. 6, 7, & 8.

It was regulated in ſome of the Dynaſties of China, that the brothers of the emperor ſhould ſucceed to the throne, and that the children ſhould not. If they were willing that the prince ſhould have a certain degree of experience, if they feared their being too young, if it was become neceſſary to prevent eunuchs from placing children ſucceſſively on the throne, they might very juſtly eſtabliſh a like order of ſucceſſion; and when ſome (b) writers have treated theſe brothers as uſurpers, they have judged only from ideas received from the laws of their own countries.

(b) Duhalde on the 2d Dynaſty.

According to the cuſtom of Numidia (c) Delſace, brother of Gela, ſucceeded to the kingdom; not Maſſiniſſa, his ſon.

(c) Livy Decad. iii. Lib. 9.

There are monarchies merely elective; and ſince it is evident, that the order of ſucceſſion ought to be derived from the political or civil laws; it is for theſe to decide in what caſes it is agreeable to reaſon, that the ſucceſſion be granted to children, and in what caſes it ought to be given to others.

In a kingdom of (d) Arabia, the day the ſovereign mounted the throne, they ſet guardians over all the pregnant women of the country, and the child who came firſt into the world was the heir apparent.

(d) Strabo, lib. xvi.

In

BOOK XXVI. Chap. 6.

In countries where polygamy is eſtabliſhed, the prince has many children; the number of them is much greater in ſome of theſe countries than in others. There are * ſtates, where it is impoſſible for the people to maintain the children of the king: they might therefore make it a law, that the crown ſhall not devolve on the king's children, but on thoſe of his ſiſter.

A prodigious number of children would expoſe the ſtate to the moſt dreadful civil wars. The order of ſucceſſion which gives the crown to the children of the ſiſter, the number of whom is not larger than thoſe of a prince who has only one wife, muſt prevent theſe inconveniencies.

There are people amongſt whom reaſons of ſtate, or ſome maxims of religion, have made it neceſſary that the crown ſhould be always fixed in a certain family: from hence, in India, proceeds the jealouſy of their (a) tribes, and the fear of loſing the deſcent: they have there conceived, that never to want princes of the blood royal, they ought to take the children of the eldeſt ſiſter of the king.

(a) See Edifying Letters, Let. 14. and the Voyages that contributed to the eſtabliſhment of an Eaſt-India company, Vol. iii. Part 2. Pag. 644.

A general maxim: 'Tis an obligation of the law of nature, to provide for our children; but to make them our ſucceſſors, is an obligation of the civil or political law. From hence are derived the different regulations, with reſpect to baſtards, in the different countries of the world: theſe are according to the civil or political laws of each country.

* As at Lovengo in Africa. See the Collection of Voyages that contributed to the eſtabliſhment of an Eaſt-India company. Vol. iv. Part. 1. Pag. 114.

CHAP.

CHAP. VII.

That we ought not to decide by the precepts of religion, what belongs only to the law of nature.

THE Abyſſines have a moſt ſevere lent of fifty days, which weakens them to ſuch a degree, that for a long time they are incapable of buſineſs: the Turks ( ) do not fail to attack them after their lent. Religion ought, in favour of the natural right of ſelf-defence, to ſet bounds to theſe cuſtoms.

The Jews were obliged to keep the ſabbath; but it was an inſtance of great ſtupidity in this nation, not to defend themſelves when their enemies choſe to attack them on this day. Cambyſes laying ſiege to Peluſium, ſet in the firſt rank a great number of thoſe animals, which the Ægyptians regarded as ſacred, the conſequence was, that the ſoldiers of the garriſon durſt not moleſt them. Who does not ſee that ſelf-defence is a duty ſuperior to every precept?

Book XXVI. Chap. 7. & 8.

(a) Collection of Voyages that contributed to the Eſtabliſhment of an Eaſt-India company, Vol. iv. pag. 35. & 103.

(b) Leg. 5. ff. *ad leg. Juliam peculatûs.*

CHAP. VIII.

That we ought not to regulate by the principles of the canon law, things which ſhould be regulated by thoſe of the civil law.

BY the (b) civil law of the Romans, he who took a thing privately from a ſacred place, was puniſhed only for the guilt of theft: by the (c) canon law, he is puniſhed for the crime of ſacrilege. The canon law takes cognizance of the place, the civil law of the fact. But to attend only to the place, is neither to reflect on the nature and definition of a theft, nor on the nature and definition of ſacrilege.

As the huſband might demand a ſeparation, by reaſon of the infidelity of his wife; the wife might formerly (d) demand it, on account of the infidelity of the huſband. This cuſtom, contrary to a regulation made in the (e) Roman laws, was introduced into

(c) Capite quiſquis 17. queſtione 4. *Cujas* obſervat. lib. xiii. cap. 19. tom. iii.

(d) *Beaumanoir* on the ancient cuſtoms of the Beauvoiſis. cap. 18.

(e) Law of the firſt Code, *ad leg. Juliam de* adulteriis.

Book XXVI. Chap. 9.

into the eccleſiaſtic courts*. where nothing was regarded but the maxims of canon law; and indeed, if we conſider marriage as a thing merely ſpiritual, and as relating only to the things of another life, the violation is in both caſes the ſame. But the political and civil laws of almoſt all nations, have with reaſon made a diſtinction between them. They have required from the women a degree of reſerve and continency, which they have not exacted from the men; becauſe, in women, a violation of chaſtity ſuppoſes a renunciation of all virtue; becauſe women, by violating the laws of marriage, quit the ſtate of their natural dependence; becauſe nature has marked the infidelity of women, with certain ſigns; and, in fine, becauſe the children of the wife born in adultery neceſſarily belong, and are an expence to the huſband, while the children produced by the adultery of the huſband, are not the wife's, nor are an expence to the wife.

CHAP. IX.

That things which ought to be regulated by the principles of civil law, can ſeldom be regulated by thoſe of religion.

THE laws of religion have a greater ſublimity, the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodneſs of the perſon that obſerves them, than of the ſociety in which they are obſerved: the civil laws, on the contrary, have more in view the moral goodneſs of men in general, than that of individuals.

Thus, venerable as thoſe ideas are which immediately ſpring from religion, they ought not always to ſerve as a firſt principle to the civil laws; becauſe theſe have another, the general welfare of ſociety.

The

* At preſent they do not take cognizance of theſe things in France.

The Romans made regulations amongſt themſelves, to preſerve the morals of their women; theſe were political inſtitutions. Upon the eſtabliſhment of monarchy, they made civil laws on this head, and formed them on the principles of their civil government. When the Chriſtian religion became predominant, the new laws that were then made, had leſs relation to the general rectitude of morals, than to the holineſs of marriage; they had leſs regard to the union of the two ſexes in a civil, than in a ſpiritual ſtate.

At firſt by the (a) Roman law a huſband who brought back his wife into his houſe, after her being found guilty of adultery, was puniſhed as an accomplice in her debauch. Juſtinian (b) from other principles, ordained, that during the ſpace of two years he might go and take her again out of the monaſtery.

(a) Leg. 11. §. ult. ff. *ad leg.* Juliam de adulteriis.

(b) Nov. 134. Coll. ix. cap. 10. tit. 170.

In the firſt ages, when a woman whoſe husband was gone to war, heard no longer any tidings of him, ſhe might eaſily marry again, becauſe ſhe had in her hands the power of making a divorce. The law of (c) Conſtantine obliged the woman to wait four years, after which ſhe might ſend the bill of divorce to the general; and, if her huſband returned, he could not then accuſe her with adultery. But Juſtinian (d) decreed, that let the time be ever ſo long after the departure of her huſband, ſhe ſhould not marry, unleſs by the depoſition and oath of the general, ſhe could prove the death of her huſband. Juſtinian had in view the indiſſolubility of marriage; but we may ſafely ſay, that he had it too much in view. He demanded a poſitive proof, when a negative proof was ſufficient; he required a thing extremely difficult, to give an account of the fate of a man at a great diſtance, and expoſed to ſo many accidents; he preſumed a crime, that is, a deſertion of the huſband, when it was ſo natural to preſume his death. He injured the commonwealth, by obliging

(c) Leg. 7. *de repudiis & judicio de moribus ſublato.*

(d) Auth. hodie quamiſcumque Cod. *de repudiis.*

Book XXVI. Chap. 10.

liging women to live out of marriage; he injured the individual, by expoſing them to a thouſand dangers.

(a) Auth. quod hodie Cod. *de repudiis.*

The law of Juſtinian (a), which ranked amongſt the cauſes of divorce the conſent of the husband and wife to enter into a monaſtery, was entirely oppoſite to all the principles of the civil laws. It is natural that the cauſes of divorce ſhould have their origin in certain impediments, which could not be foreſeen before marriage; but this deſire of preſerving chaſtity might be foreſeen, ſince it is in our ſelves. This law favours inconſtancy in a ſtate, which is by its very nature perpetual; it ſhocks the fundamental principle of divorce, which permits the diſſolution of one marriage only from the hope of another. In ſhort, if we view it in a religious light, it is no more than giving victims to God without a ſacrifice.

CHAP. X.

In what caſe we ought to follow the civil law which permits, and not the law of religion which forbids.

WHEN a religion which prohibits polygamy is introduced into a country where it is permitted, we cannot believe, (ſpeaking only as politicians) that the laws of the country ought to ſuffer a man who has many wives to embrace this religion; unleſs the magiſtrate or the husband ſhould indemnify them, by reſtoring them ſome way or other to their civil ſtate. Without this their condition would be deplorable; no ſooner would they obey the laws, than they would find themſelves deprived of the greateſt advantages of ſociety.

CHAP.

CHAP. XI.

That human courts of juſtice ſhould not be regulated by the maxims of thoſe tribunals which relate to the other life.

THE tribunal of the inquiſition, formed by the Chriſtian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has every where met with a general diſlike, and muſt have ſunk under the oppoſitions it met with, if thoſe who were reſolved to eſtabliſh it, had not drawn advantages even from theſe oppoſitions. Book XXVI. Chap. 11. & 12.

This tribunal is inſupportable in all governments. In monarchies, it only makes informers and traitors; in republics, it only forms diſhoneſt men; in a deſpotic ſtate, it is as deſtructive as the government itſelf.

CHAP. XII.

The ſame ſubject continued.

IT is one abuſe of this tribunal, that of two perſons accuſed of the ſame crime, he who denies is condemned to die, and he who confeſſes avoids the puniſhment. This has its ſource in monaſtic ideas, where he who denies, ſeems in a ſtate of impenitence and damnation; and he who confeſſes, in a ſtate of repentance and ſalvation. But a diſtinction of this kind can have no relation to human tribunals. Human juſtice, which ſees only the actions, has but one compact with men, namely that of innocence; divine juſtice, which ſees the thoughts, has two, that of innocence and repentance.

CHAP. XIII.

In what caſes, with regard to marriages, we ought to follow the laws of religion, and in what caſes we ſhould follow the civil laws.

BOOK XXVI. Chap. 13.

IT has happened in all ages and countries, that religion has been blended with marriages. When certain things have been conſidered as impure or unlawful, and were nevertheleſs become neceſſary, they were obliged to call in religion, to legitimate in the one caſe, and to reprove them in others.

On the other hand, as marriage is of all human actions that in which ſociety is moſt intereſted, it became proper that this ſhould be regulated by the civil laws.

Every thing which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulneſs it occaſions, a fruitfulneſs that has made all nations conſider it as the object of a particular benediction; which, not being always annexed to it, depended on certain ſuperior graces: all this, I ſay, is within the reſſort of religion.

The conſequences of this union, with regard to property, the reciprocal advantages, every thing which has a relation to the new family, to that from which it ſprung, to that which is expected to ariſe; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here ſtamps its ſeal, and the civil laws join theirs to it; to the end that it may be as authentic as poſſible. Thus beſides the conditions required by religion to make a marriage valid, the civil laws may ſtill exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion inſiſts upon certain ceremonies, the civil laws on the conſent of fathers; in this caſe they

hey demand ſomething more than that of religion, but they demand nothing contrary to it.

It follows from hence, that the religious law muſt decide whether the bond be indiſſoluble, or not; for if the laws of religion had made the bond indiſſoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with reſpect to marriage, are not abſolutely neceſſary; ſuch are thoſe eſtabliſhed by the laws, which inſtead of annulling the marriage, only puniſh thoſe who contract it.

Amongſt the Romans the Papian law declared thoſe marriages illegal which had been prohibited, and yet only ſubjected them to a penalty *; but a ſenatus-conſultum, made at the inſtance of the emperor Marcus Antoninus, declared them void; there then no longer ſubſiſted † any ſuch thing as a marriage, wife, dowry, or husband. The civil laws determine according to circumſtances: ſometimes they are moſt attentive to repair the evil; at others, to prevent it.

CHAP. XIV.

In what inſtances marriages between relations ſhould be regulated by the laws of nature; and in what inſtances by the civil laws.

WITH regard to the prohibition of marriage between relations, it is a thing extremely delicate, to fix exactly the point at which the laws of nature ſtop, and where the civil laws begin. For this purpoſe we muſt eſtabliſh ſome principles.

The marriage of the ſon with the mother confounds the ſtate of things: the ſon ought to have an

* See what has been ſaid on this ſubject in Book xxiii. Chap. 21.

† See Law 16. ff. *de ritu nuptiarum*; and Law 3. §. 1. alſo Digeſt. *de donationibus inter virum & uxorem.*

Book XXVI. Chap. 14.

unlimited reſpect to his mother, the wife owes an unlimited reſpect to her husband; therefore the marriage of the mother to her ſon, would ſubvert the natural ſtate of both.

Beſides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men; and for the ſame reaſon, women ſooner looſe this ability, and men later. If the marriage between the mother and the ſon was permitted, it would almoſt always be the caſe, that when the husband was capable of entering into the views of nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to nature, as well as the other; but it is leſs contrary, becauſe it has not theſe two obſtacles. Thus the Tartars, who may marry their daughters*, never marry their mothers, as we ſee in the accounts we have of that nation (a).

(a) Hiſt. of the Tartars, Part iii. Pag. 236.

It has ever been the natural duty of fathers to watch over the chaſtity of their children. Intruſted with the care of their education, they are obliged to preſerve the body in the greateſt perfection, and the mind from the leaſt corruption; to encourage whatever has a tendency to inſpire them with virtuous deſires, and to nouriſh a becoming tenderneſs. Fathers, always employed in preſerving the morals of their children, muſt have a natural averſion to every thing that can render them corrupt. Marriage, you will ſay, is not a corruption: but before marriage they muſt ſpeak, they muſt make their perſons beloved, they muſt ſeduce: it is this ſeduction which ought to inſpire us with horror.

There ſhould be therefore an unſurmountable barrier between thoſe who ought to give the education, and thoſe who are to receive it, in order to prevent every kind of corruption, even though the motive be

* This law is very ancient among them. Attila, ſays Priſcus in his embaſſy, ſtopt in a certain place to marry Eſca his daughter. *A thing permitted*, he adds, *by the laws of the Scythians*, pag. 22.

be lawful. Why do fathers ſo carefully deprive thoſe who are to marry their daughters, of their company, and familiarity?

The horror that ariſes againſt the inceſt of the brother with the ſiſter, ſhould proceed from the ſame ſource. The deſire of fathers and mothers to preſerve the morals of their children and families untainted, is ſufficient to inſpire their offspring with a deteſtation of every thing that can lead to the union of the two ſexes.

The prohibition of marriage between couſin-germans, has the ſame original. In the early ages, that is, in the times of innocence; in the ages when luxury was unknown, it was cuſtomary for children * upon their marriage, not to remove from their parents, but to ſettle in the ſame houſe, as a ſmall habitation was at that time ſufficient for a large family. The children † of two brothers, or couſin-germans, were conſidered both by others and themſelves, as brothers. The eſtrangement then between the brothers and ſiſters, as to marriage §, ſubſiſted alſo between the couſin-germans.

Theſe principles are ſo ſtrong and ſo natural, that they have had their influence almoſt all over the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formoſa (a), that the marriage of relations of the fourth degree was inceſtuous: it was not the Romans that communicated this ſentiment to the Arabs (b); it was not they who taught it to the inhabitants of the Maldivian iſlands (c).

But if ſome nations have not rejected marriages between fathers and children, ſiſters and brothers;

(a) Collection of Voyages to the Indies, Vol. 5. Part 1. An Account of the ſtate of the iſle of Formoſa.

* It was thus amongſt the firſt Romans.

† Amongſt the Romans they had the ſame name, the couſin-germans were called brothers.

§ It was thus at Rome in the firſt ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his couſin-german. Plutarch's Treatiſe, intitled, *Queſtions concerning the affairs of the Romans.*

(b) Alcoran, chap. *of women.*

(c) See Francis Pirard.

Book XXVI. Chap. 14.

we have ſeen in the firſt book, that intelligent beings do not always follow the law of nature. Who could have imagined it? Religious ideas have frequently made men fall into theſe miſtakes. If the Aſſyrians and the Perſians married their mothers, the firſt were influenced by a religious reſpect for Semiramis, and the ſecond did it becauſe the religion of Zoroaſter gave a preference * to theſe marriages. If the Ægyptians married their ſiſters, it proceeded from the wildneſs of the Ægyptian religion, which conſecrated theſe marriages in honor of Iſis. As the ſpirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being conſecrated by a falſe religion.

The principle which informs us that marriages between fathers and children, between brothers and ſiſters, are prohibited, in order to preſerve natural modeſty in families, will help us to the diſcovery of thoſe marriages that are forbidden by the law of nature, and of thoſe which can be ſo only by the civil law.

As children dwell, or are ſuppoſed to dwell in their father's houſe, and conſequently the ſon-in-law with the mother-in-law, the father-in-law with his wife's daughter-in-law; the marriage between them is forbidden by the law of nature. In this caſe the reſemblance has the ſame effect as the reality, becauſe it ſprings from the ſame cauſe: the civil law neither can nor ought to permit theſe marriages.

There are nations, as we have already obſerved, amongſt whom couſin-germans are conſidered as brothers, becauſe they commonly dwell in the ſame houſe: there are others, where this cuſtom is not known. Amongſt the firſt, the marriage of couſin-germans ought to be regarded as contrary to nature; not

* They were conſidered as more honourable. See Philo *de ſpecialibus legib. quæ pertinent ad præcepta Decalogi.* Paris 1640. pag. 778.

not ſo amongſt the others. But the laws of nature cannot be local. Wherefore, when theſe marriages are forbidden, or permitted, they are according to the circumſtances permitted or forbidden by a civil law.

It is not a neceſſary cuſtom for the brother-in-law and the ſiſter-in-law to dwell in the ſame houſe. The marriage between them is not then prohibited to preſerve chaſtity in the family, and the law which forbids or permits it, is not a law of nature, but a civil law regulated by circumſtances, and dependent on the cuſtoms of each country: theſe are caſes in which the laws depend on the morals, or cuſtoms of the inhabitants.

The civil laws forbid marriages, when by the cuſtoms received in a certain country they are found to be in the ſame circumſtances as thoſe forbidden by the law of nature; and they permit them when this is not the caſe. The prohibitions of the laws of nature are invariable; becauſe the thing on which they depend is invariable; the father, the mother, and the children, neceſſarily dwell in the ſame houſe. But the prohibitions of the civil laws are accidental, becauſe they depend on an accidental circumſtance; couſin-germans and others dwelling in the houſe by accident.

This explains why the laws of Moſes, thoſe of the Egyptians (a), and of many other nations, permitted the marriage of the brother-in-law with the ſiſter-in-law; whilſt theſe very marriages were diſallowed by other nations.

(a) See Law 8. of the Code *de inceſtis & inutilibus nuptiis.*

In the Indies they have a very natural reaſon for admitting this ſort of marriages. The uncle is there conſidered as the father, and is obliged to maintain and educate his nephew, as if he was his own child: this proceeds from the diſpoſition of theſe people, which is good-natured and full of humanity. This law, or this cuſtom, has produced another; if a husband has loſt his wife, he does not fail to marry

Book XXVI. Chap. 15.

her ſiſter: and this is extremely natural, for his new conſort becomes the mother of her ſiſter's children, and not a cruel ſtep-mother.

CHAP. XV.

That we ſhould not regulate by the principles of political law, thoſe things which depend on the principles of civil law.

AS men have given up their natural independence to live under political laws, they have given up the natural participation of property to live under civil laws.

By the firſt, they acquired liberty; by the ſecond, property. We ought not to decide by the laws of liberty, which, as we have already ſaid, is only the government of the community, what ought to be decided by the laws concerning property. 'Tis a paralogiſm to ſay, that the good of the individual ought to give way to that of the public: this can never take place, but when the government of the community, or, in other words, the liberty of the ſubject is concerned; this does not affect thoſe caſes which relate to private property, becauſe the public good conſiſts in every one's having that property which was given him by the civil laws, invariably preſerved.

Cicero maintains, that the Agrarian laws were unjuſt; becauſe the community was eſtabliſhed with no other view, but that every one might be able to preſerve his property.

Let us therefore lay down as a certain maxim, that whenever the public good happens to be the matter in queſtion, it is never for the advantage of the public to deprive an individual of his property, or even to retrench the leaſt part of it by a law, or a political regulation. In this caſe we ſhould follow the rigour of the civil law, which is the *Palladium* of property.

Thus

Thus when the public has occaſion for the eſtate of an individual, it ought never to act by the rigour of political law; it is here that the civil law ought to triumph, who with the eyes of a mother regards every individual as the whole community.

If the political magiſtrate would erect a public edifice, or make a new road, he muſt indemnify thoſe who are injured by it; the public is in this reſpect like an individual, who treats with an individual. It is full enough, that it can oblige a citizen to ſell his inheritance, and that it can ſtrip him of this great privilege which he holds from the civil law, the not being forced to alienate his poſſeſſions.

After the nations that ſubverted the Roman empire had abuſed their very conqueſts, the ſpirit of liberty called them back to that of equity. They exerciſed the moſt barbarous laws with moderation: and if any one ſhould doubt the truth of this, they need only read Beaumanoir's admirable work on Juriſprudence, written in the twelfth century.

They mended the highways in his time, as we do at preſent. He ſays, that when a highway could not be repaired, they made a new one as near the old as poſſible; but indemnified the proprietors at the * expence of thoſe who reaped any advantage from the road. They determined at that time by the civil law; in our days, we determine by the law of politics.

CHAP. XVI.

That we ought not to decide by the rules of the civil law, when it is proper to decide by thoſe of the law of politics.

MOST difficulties on this ſubject may be eaſily ſolved, by not confounding the rules derived from property with thoſe which ſpring from liberty.

Is

* The Lord appointed collectors to receive the toll from the peaſant, the gentlemen were obliged to contribute by the count, and the clergy by the biſhop. *Beaumanoir*, chap. xxii.

Book XXVI. Chap. 16.

Is the domain of a ſtate or government alienable, or is it not? This queſtion ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, becauſe it is as neceſſary that there ſhould be domains for the ſubſiſtence of a ſtate, as that the ſtate ſhould have civil laws to regulate the diſpoſal of property.

If then they alienate the domain, the ſtate will be forced to make a new fund for another. But this expedient overturns the political government, becauſe by the nature of the thing, for every domain that ſhall be eſtabliſhed, the ſubject will always be obliged to pay more, and the ſovereign to receive leſs; in a word the domain is neceſſary, and the alienation is not.

The order of ſucceſſion is, in monarchies, founded on the welfare of the ſtate, which makes it neceſſary that this order ſhould be fixed to avoid the misfortunes, which, I have ſaid, muſt ariſe in a deſpotic kingdom, where all is uncertain becauſe all is arbitrary.

The order of ſucceſſion is not fixed for the ſake of the reigning family; but becauſe it is the intereſt of the ſtate, that it ſhould have a reigning family. The law which regulates the ſucceſſion of individuals is a civil law, whoſe view is the intereſt of individuals; that which regulates the ſucceſſion to monarchy is a political law, which has in view the welfare and preſervation of the kingdom.

It follows from hence, that when the political law has eſtabliſhed an order of ſucceſſion in government, and this order is at an end, it is abſurd to reclaim the ſucceſſion in virtue of the civil law of any nation whatſoever. One particular ſociety does not make laws for another ſociety. The civil laws of the Romans are no more applicable than any other civil laws. They themſelves did not make uſe of them when they proceeded againſt kings; and the

maxims

maxims by which they judged kings are ſo abominable, that they ought never to be revived. BOOK XXVI. Chap. 17.

It follows alſo from hence, that when the political law has excluded a family from the ſucceſſion, it is abſurd to inſiſt upon the reſtitutions drawn from the civil law. Reſtitutions are in the law, and may be good againſt thoſe who live in the law: but they are not proper for ſuch as have been raiſed up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the univerſe, by the ſame maxims on which (to make uſe of an expreſſion of (*) Cicero's) ſhe ſhould decide the right of a gutter between individuals. (a) Lib. I. of Laws.

CHAP. XVII.

The ſame ſubject continued.

OStraciſm ought to be examined by the rules of politics, and not by thoſe of the civil law; and ſo far is this cuſtom from rendering a popular government odious, that it is, on the contrary, extremely adapted to prove its lenity. We ſhould be ſenſible of this ourſelves, if, while baniſhment is always conſidered amongſt us as a penalty, we were able to ſeparate the idea of oſtraciſm from that of puniſhment.

Ariſtotle (b) tells us, that it is univerſally allowed that this practice has ſomething in it both humane and popular. If in thoſe times and places where this ſentence was executed, they found nothing in it that appeared odious; is it for us, who ſee things at ſuch a diſtance, to think otherwiſe than the accuſers, the judges, and the accuſed themſelves? (b) Repub. lib. iii. cap. 13.

And if we conſider that this judgment of the people loaded the perſon with glory on whom it was paſſed; that when at Athens it fell upon a man without (c) merit, from that very moment they ceaſed (c) *Hyperbolus*, ſee *Plutarch's* life of Ariſtides.

Book XXVI. Chap. 18. & 19.

ceaſed to * uſe it; we ſhall find that numbers of people have entertained a falſe idea of it, and that it was an admirable law which could prevent the ill conſequences which the glory of a citizen might produce, by loading him with new glory.

CHAP. XVIII.

That it is neceſſary to enquire, whether the laws which ſeem contradictory are of the ſame claſs.

AT Rome the huſband was permitted to lend his wife to another. Plutarch tells us this (a) in expreſs terms. We know that Cato lent his (b) wife to Hortenſius, and Cato was not a man to violate the laws of his country.

On the other hand, a huſband who ſuffered his wife to be debauched, who did not bring her to juſtice, or who took her again after her (c) condemnation, was puniſhed. Theſe laws ſeem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife, was viſibly a Lacedemonian inſtitution, eſtabliſhed with a view of giving the republic children of a good ſpecies, if I may be allowed the term: the other had in view the preſervation of morals. The firſt was a law of politics, the ſecond a civil law.

(a) *Plutarch* in his compariſon between *Lycurgus* and *Numa*.

(b) Plutarchs life of *Cato*.

(c) Leg. 11. §. ult. ff. *ad leg. Jul. de adulteriis.*

CHAP. XIX.

That we ought not to decide thoſe things by the civil law, which ought to be decided by domeſtic laws.

THE law of the Viſigoths enjoins, that the (d) ſlaves of the houſe ſhall be obliged to bind the man and woman they ſurpriſe in adultery, and to preſent them to the husband and to the judge: a terrible law, which puts into the hands of ſuch mean perſons the care of public, domeſtic, and private vengeance!

(d) Law of the Viſigoths, lib. iii. tit. 4. §. 6.

This

* It was found oppoſite to the ſpirit of the legiſlator.

This law can be no where proper but in the ſeraglio's of the eaſt, where the ſlave who has the charge of the incloſure, is deemed an accomplice upon the diſcovery of the leaſt infidelity. He ſeizes the criminals, not ſo much with a view to bring them to juſtice, as to do juſtice to himſelf, and to obtain a ſcrutiny into the circumſtances of the action, in order to remove the ſuſpicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to ſubject thoſe who govern the family, to the inquiſition of their ſlaves.

This inquiſition may in certain caſes be at the moſt, a particular domeſtic regulation, but never a civil law.

CHAP. XX.

That we ought not to decide by the principles of the civil laws, thoſe things which belong to the law of nations.

LIBERTY conſiſts principally in not being forced to do a thing where the laws do not oblige: People are in this ſtate, only as they are governed by civil laws, and becauſe they live under thoſe civil laws, they are free.

It follows from hence, that princes who live not amongſt themſelves under civil laws, are not free; they are governed by force; they may continually force, or be forced. From hence it follows, that treaties made by force, are as obligatory as thoſe made by free conſent. When we who live under civil laws, are, contrary to law, conſtrained to enter into a contract, we may, by the aſſiſtance of the law, recover from the effects of violence: But a prince, who is always in that ſtate in which he forces or is forced, cannot complain of a treaty which he has been obliged by violence to enter into. This would be to complain of his natural ſtate; it would ſeem as if he would be a prince with reſpect to other princes,

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princes, and as if other princes ſhould be ſubjects with reſpect to him; that is, it would be contrary to the nature of things.

CHAP. XXI.

That we ſhould not decide by political laws, things which belong to the law of nations.

POLITICAL laws demand that every man be ſubject to the criminal and civil courts of the Country where he reſides, and to the cenſure of the ſovereign.

The law of nations requires, that princes ſhall ſend ambaſſadors; and a reaſon drawn from the nature of things does not permit theſe ambaſſadors to depend either on the ſovereign to whom they are ſent, or on his tribunals. They are the voice of the prince who ſends them, and this voice ought to be free; no obſtacle ſhould hinder the execution of their office; they may frequently offend, becauſe they ſpeak for a man entirely independent; they might charge them with crimes, if they were liable to be puniſhed for crimes, if they could be arreſted for debts, theſe might be forged. Thus a prince who has naturally a bold and enterpriſing ſpirit, would ſpeak by the mouth of a man who had every thing to fear. We muſt then be guided with reſpect to ambaſſadors, by reaſons drawn from the law of nations, and not by thoſe derived from political law. But if they make an ill uſe of their repreſentative character, a ſtop may be put to it, by ſending them back. They may even be accuſed before their maſter, who by this means becomes either their judge or their accomplice.

CHAP.

CHAP. XXII.

The unhappy ſtate of the Ynca Athualpa.

THE principles we have juſt been eſtabliſhing were cruelly violated by the Spaniards. The Ynca Athualpa (a) could not be tried but by the law of nations; they tried him by political and civil laws; they accuſed him for putting to death ſome of his own ſubjects, or having many wives, &c. and to fill up the meaſure of their ſtupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

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(a) See the Ynca *Garcilaſſo de la Vega.*

CHAP. XXIII.

That when by ſome circumſtance the political law becomes deſtructive to the ſtate, we ought to decide by ſuch a political law as will preſerve it, which ſometimes becomes a law of Nations.

WHEN that political law which has eſtabliſhed in the kingdom a certain order of Succeſſion, becomes deſtructive to the body politic for whoſe ſake it was eſtabliſhed, there is not the leaſt room to doubt but another political law may be made to change this order; and ſo far would this law be from oppoſing the firſt, it would in the main be entirely conformable to it, ſince both would depend on this principle, that, THE SAFETY OF THE PEOPLE IS THE SUPREME LAW.

I have ſaid, that a great kingdom becoming acceſſory to another, is itſelf weakened, and even weakens the principal. We know that it is for the intereſt of the ſtate to have the ſupreme magiſtrate within itſelf, that the public revenues be well adminiſtered, that its ſpecie be not ſent abroad to enrich another country. It is of importance, that he who ought to govern, has not imbibed foreign maxims: Theſe

are

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are leſs agreeable than thoſe already eſtabliſhed. Beſides, men have an extravagant fondneſs for their own laws and cuſtoms: Theſe conſtitute the happineſs of every community; and, as we learn from the hiſtories of all nations, are rarely changed without violent commotions and a great effuſion of blood.

It follows from hence, that if a great ſtate has to its heir the poſſeſſor of a great ſtate, the firſt may reaſonably exclude him, becauſe a Change in the order of ſucceſſion muſt be of ſervice to both ſtates. Thus a law of Ruſſia made in the beginning of the reign of Elizabeth, moſt wiſely excluded from the poſſeſſion of the crown, every heir who poſſeſſed another monarchy; thus the law of *Portugal* diſqualifies every ſtranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reaſon be allowed a right to oblige the prince to reſign. If the people fear that a certain marriage will be attended with no other conſequences, but ſuch as will rob the nation of its independence, or diſmember ſome of its provinces, it may very juſtly oblige both the contractors and their deſcendants to reſign all right over them; while he who reſigns, and thoſe to whoſe prejudice he reſigns, have the leſs reaſon to complain, as the ſtate might originally have made a law to exclude them.

CHAP. XXIV.

That the regulations of the Police *are of a different claſs from other civil laws.*

THERE are criminals whom the magiſtrate puniſhes, there are others whom he reproves. The firſt are ſubject to the power of the law, the others to his Authority: thoſe are cut off from ſociety; theſe they oblige to live according to the rules of ſociety.

In the exerciſe of the *Police*, it is rather the magiſtrate

giſtrate who puniſhes than the law; in the ſentence paſt on crimes, it is rather the law which puniſhes than the magiſtrate. The buſineſs of the *Police* conſiſts of affairs which ariſe every inſtant, and are commonly of the moſt trifling nature: There is then but little need of formalities. The actions of the *Police* are quick, they are exerciſed over things which return every day; it would be therefore improper for it to inflict ſevere puniſhments. It is continually employed about minute particulars; great examples are therefore not deſigned for its purpoſe. It is governed rather by regulations than laws; thoſe who are ſubject to its juriſdiction are inceſſantly under the eye of the magiſtrate: It is therefore the fault of the magiſtrate if they fall into exceſs. Thus we ought not to confound a flagrant violation of the laws, with a ſimple breach of the *Police*; theſe things are of a different order.

From hence it follows, that the laws of that Italian * republic where bearing fire-arms is puniſhed as a capital crime, and where it is not more fatal to make an ill uſe of them than to carry them, is not agreeable to the nature of things.

It follows moreover, that the applauded action of that Emperor, who cauſed a baker to be empaled whom he had found guilty of a fraud, was the action of a ſultan, who knew not how to be juſt, without committing an outrage on juſtice.

CHAP. XXV.

That we ſhould not follow the general diſpoſitions of the civil law, in things which ought to be ſubject to particular rules drawn from their own nature.

IS it a good law, that all civil obligations paſſed between ſailors in a ſhip in the courſe of a voyage ſhould be null? Francis Pirard (a) tells us, that in his time it was not obſerved by the Portugueſe, tho'

(a) Chap. 14. p. 12.

* Venice.

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it was by the French. Men who are together only for a ſhort time; who have no wants, ſince they are provided for by the prince; who have only one object in view, that of their voyage; who are no longer in ſociety, but are only the inhabitants of a ſhip, ought not to contract obligations that were never introduced, but to ſupport the burthen of civil ſociety.

In the ſame ſpirit was a law of the Rhodians, made at a time when they always followed the coaſts; it ordained that thoſe who during a tempeſt ſtaid in a veſſel, ſhould have ſhip and cargo, and thoſe who quitted it ſhould have nothing.

BOOK XXVII.

Of the origin and revolutions of the Roman laws on ſucceſſions.

CHAP. I.

Of the Roman laws on ſucceſſions.

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THIS affair derives its eſtabliſhment from the moſt diſtant antiquity; and to penetrate to its foundation, permit me to ſearch into the firſt laws of the Romans, which, I believe, have not yet been enquired into.

(a) Dionyſ. Halicar. Lib. 2. c. 3. *Plutarch*'s compariſon between *Numa* and *Lycurgus*.

We know that Romulus (a) divided the land of his little kingdom among his ſubjects; it ſeems to me, that from hence the laws of Rome on ſucceſſions were derived.

The law of the diviſion of lands made it neceſſary that the property of one family ſhould not paſs into another: from hence it followed, that there were but two orders of heirs eſtabliſhed by law *, the children and all the deſcendants that lived under the

* *Aſt ſi inteſtato moritur cui ſuus hæres nec extabit, agnatus proximus familiam habeto.* Fragment of the law of the twelve tables in Ulpian, the laſt title.

the power of the father, whom they called his direct heirs; and in their default, the neareſt male relations, whom they called *Agnati*.

It followed likewiſe, that the relations by the wife, whom they called *Cognati*, ought not to ſucceed; they would have conveyed the eſtate into another family, which was not allowed.

From thence alſo it followed, that the children ought not to ſucceed to their mother, nor the mother to her children; for this might carry the eſtate of one family into another. Thus we ſee them excluded (a) by the law of the twelve tables; it called none to the ſucceſſion but the *Agnati*, and there was no agnation between the ſon and the mother.

(a) See the Frag. of Ulpian, §. 8. tit. 26.

But it was indifferent whether the direct heir, or, in his default, the neareſt by agnation, was male or female; becauſe, as the relations on the mother's ſide could not ſucceed, tho' a woman who was an heireſs ſhould happen to marry, yet the eſtate always returned into the family from whence it came. On this account the law of the twelve tables, does not diſtinguiſh whether the perſon (b) who ſucceeded was male or female.

Juſt. tit. 3. *in præmio ad S. C. Tertullianum.*

(b) Paulus, lib. 4. ſent. tit. 8. §. 3.

This was the cauſe, that tho' the grand children by the ſon ſucceeded to the grandfather, the grandchildren by the daughter did not ſucceed; for, to prevent the eſtate from paſſing into another family, the *Agnati* were preferred before them. Thus the daughter, and not her (c) children, ſucceeded to the father.

(c) Inſtit. lib. 3. §.

Thus amongſt the firſt *Romans* the women ſucceeded, when this was agreeable to the law of the diviſion of lands; and they did not ſucceed when this law might ſuffer by it.

Such were the laws of ſucceſſion amongſt the firſt Romans; and as theſe had a natural dependance on the conſtitution, and were derived from the diviſion of lands, it is eaſy to perceive that they had not a foreign original, and were not of the number of

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those brought into the republic by the deputies sent into the cities of Greece.

(a) Lib. 4. p. 276.

Dionysius Halicarnasseus (a) tells us, that Servius Tullius finding the laws of *Romulus* and *Numa* on the division of lands abolished, he restored them, and made new ones, to give the old a greater weight. We cannot therefore doubt, but that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of succession having been established in consequence of a political law, no citizen was to be allowed to break in upon it by his private will; that is, in the first ages of Rome, he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect, the laws with the desires of the individual. He was permitted to dispose of his substance in an assembly of the people, and thus every testament was, in some sort, an act of the legislative power.

The law of the twelve tables permitted the person who made his will, to chuse which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed *ab intestate*, was the law of the division of lands; and the reason why they extended so widely the power of the testator, was, that as the father might sell * his children, he might with greater reason deprive them of his substance. These were therefore different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

The

* Dionysius Halicarnasseus proves by a law of *Numa*, that the law which permitted a father to sell his son three times, was made by Romulus, and not by the Decemvirs. Lib. 2.

The ancient laws of Athens did not permit a citizen to make a will. Solon (a) permitted it, with an exception to those who had children: and the legislators of Rome, filled with the idea of paternal power, permitted the making a will even to the prejudice of their children. It must be confessed, that the ancient laws of Athens, were more consistent than those of Rome. The indefinite permission of making a will, which had been granted to the Romans, ruined by little and little the political regulation on the division of lands: it was the principal thing that introduced the fatal difference between riches and poverty: many shares were united in the same person; some citizens had too much, a multitude of others had nothing. Thus the people being continually deprived of their shares, were incessantly calling out for a new distribution of lands. They demanded it in an age when the frugality, the parsimony and poverty of the Romans were their distinguishing characteristic; as well as at a time when their luxury was become still more astonishing.

(a) See Plutarchs Life of Solon.

Testaments being properly a law made in the assembly of the people, those who were in the army were deprived of a testamentary power. The people therefore gave the soldiers the privilege * of making before their companions the dispositions which † should have been made before them.

The great assembly of the people met but twice a year; besides, both the people and the affairs brought before them were increased; they therefore

* This testament, called *in procinctu*, was different from that which they called military, which was established only by the constitutions of the emperors. Leg. i. ff. *de militari testamento*. This was one of the stratagems by which they cajoled the soldiers.

† This testament was not in writing, and it was without formality, *sine libra & tabulis*, as Cicero says, Lib. i. *de Orat.*

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judged it convenient to permit all the citizens to make their * will before ſome Roman citizens of full age, who were to repreſent the body of the people: they took five (a) citizens, before whom the inheritor (b) purchaſed his family, that is, his inheritance, of the teſtator; another citizen brought a pair of ſcales to weigh the value; for the Romans †, as yet, had no money.

(a) Ulpian, tit. 10. §. 2.

(b) Theoph. Inſt. lib. ii. tit. 10.

To all appearance theſe five citizens were to repreſent the five claſſes of the people; and they ſet no value on the ſixth, as being compoſed of men who had no property.

We ought not to ſay, with Juſtinian, that theſe ſales were merely imaginary; they became, indeed, imaginary in time, but were not ſo originally. Moſt of the laws which afterwards regulated theſe wills, were built on the reality of theſe ſales: we find ſufficient proof of this in the fragments of Ulpian (c). The deaf, the dumb, the prodigal, could not make a will; the deaf, becauſe he could not hear the words of the buyer of the inheritance; the dumb, becauſe he could not pronounce the terms of nomination; the prodigal, becauſe as he was excluded from the management of all affairs, he could not ſell his eſtate. I omit any further examples.

(c) Tit. 20. §. 13.

Wills being made in the aſſembly of the people, were rather the acts of political than of civil laws, a public rather than a private right; from whence it followed that the father, though his ſon was under his authority, could not give him leave to make a will.

Wills, among moſt nations, are not ſubject to greater formalities than ordinary contracts; becauſe both the one and the other are only expreſſions of the

* Inſtitut. lib. ii. tit. 10. §. 1. Aulus Gellius, lib. xv. cap. 27. They called this form of teſtament *per æs & libram.*

† T. Livy, lib. iv. *nondum argentum ſignatum erat.* He ſpeaks of the time of the ſiege of Veii.

the will of him who makes the contract, and both are equally a private right. But, amongſt the Romans; where teſtaments were derived from the public law, they were attended with much greater formalities (a), than other affairs; and this is ſtill the caſe in thoſe provinces of France which are governed by the Roman law.

(a) Inſtit. lib. ii. tit. 10. §. 1.

Teſtaments being, as I have ſaid, a law of the people, they ought to be made with the force of a command, and in ſuch terms as are called *direct and imperative* *. Hence a rule was formed, that they could neither give nor transfer an inheritance, without making uſe of the imperative words: from whence it followed, that they might very juſtly in certain caſes make an entail †; and ordain, that the inheritance ſhould paſs to another heir; but that they could never make a feoffment of truſt ‖, that is, oblige any one by form of intreaty to deliver up an inheritance, or a part of an inheritance, to another.

When the father neither appointed his ſon his heir, nor diſinherited him, the will was broken; but it was valid, though he did not diſinherit his daughter, nor appoint her his heireſs. The reaſon is plain: when it neither appointed nor diſinherited the ſon, it did an injury to the grandſon, who might have ſucceeded *ab inteſtate* to his father; but in neither appointing nor diſinheriting his daughter he did no injury to his daughter's children, who could not ſucceed *ab inteſtate* to their mother §, becauſe they were neither his direct heirs, nor *agnati*.

* Let Titius be my heir.

† Vulgar, pupillary, and exemplary.

‖ Auguſtus, for particular reaſons, firſt began to authoriſe the feoffments of truſt. Inſtit. lib. ii. tit. 23. *in præmio.*

§ *Ad liberos matris inteſtatæ hæreditas*, L. 12. Tab. *non pertinebat, quia fœminæ ſuos hæredes non habent.* Ulpian Fragm. tit. 26. §. 7.

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The laws of the firſt Romans concerning ſucceſſions being formed with the ſame ſpirit which dictated the diviſion of lands, did not ſufficiently reſtrain the riches of women; by this means a door was left open to luxury, which is always inſeparable from this ſort of riches. Between the ſecond and third Punic war, they began to perceive the evil, and made the Voconian * law. But as they were induced to this by the moſt important conſiderations, moreover as but few monuments have reached us that take notice of this law, and as it has hitherto been ſpoken of in a moſt confuſed manner, I ſhall endeavour to clear it up.

Cicero has preſerved a fragment, which forbids the appointing a woman an † heireſs, whether ſhe was married or unmarried.

The Epitome of Livy, where he ſpeaks of this law, ſays § no more: it appears from (a) Cicero and St. Auguſtin, that the daughter, and even the only child, if a daughter (b), was comprehended in the prohibition.

Cato the elder (c) contributed all in his power, to get this law paſſed. Aulus Gellius cites a fragment (d) of a ſpeech, which he made on this occaſion. By preventing the ſucceſſion of women, his intent was to take away the ſource of luxury: as by undertaking the defence of the Oppian law, he intended to put a ſtop to luxury itſelf.

In the inſtitutes of Juſtinian (e) and Theophilus (f), mention is made of a chapter of the Voconian law, which limits the power of bequeathing. In reading theſe

(a) Second Oration againſt Verres.

(b) Of the city of God, lib. iii.

(c) Epitome of Livy, lib. xli.

(d) L. xvii, cap. 6.

(e) Inſtit. lib. iii. tit. 22.

(f) Ibidem,

* It was propoſed by Quintus Voconius, tribune of the people. See Cicero's ſecond ſpeech againſt Verres. In the Epitome of T. Livy, lib. xli. we ſhould read Voconius, inſtead of Volumnius.

† *Sanxit . . . . . ne quis hæredem virginem neve mulierem faceret.* Cicero's ſecond Oration againſt Verres.

§. *Legem tulit ne quis hæredem mulierem inſtitueret*, lib. xli.

theſe authors every body would imagine that this chapter was made to prevent the inheritance from being ſo exhauſted by legacies, as to make it unworthy of the heir's acceptance. But this was not the ſpirit of the Voconian law. We have juſt ſeen, that they had in view the hindering women from inheriting an eſtate. The article of this law, which ſet bounds to the power of bequeathing, entered into this view: for if people had been poſſeſſed of the liberty to bequeath as much as they pleaſed, the women might have received as legacies, what they could not receive by ſucceſſion.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was neceſſary to deprive them of large inheritances, and not of ſuch as could not give riſe to luxury. Thus we find in Cicero (a), that women were rendered incapable of ſucceeding to none but thoſe who were rated high in the cenſor's books*.

(a) A ſecond oration againſt Verres.

The civil wars were the deſtruction of an infinite number of citizens. Under Auguſtus, Rome was almoſt deſerted: it was neceſſary to repeople it. They made the Papian laws, which omitted nothing that could encourage (b) the citizens, to marry and procreate children. One of the principal means was to increaſe, in favour of thoſe who gave into the views of the law, the hopes of being heirs, and to diminiſh the hopes of thoſe who refuſed; and as the Voconian law had rendered women incapable of ſucceeding, the Papian law, in certain caſes, diſpenſed with this prohibition.

(b) See what has been ſaid in Book xxiii. Ch. 21.

Women (c), eſpecially thoſe who had children, were rendered capable of receiving in virtue of the will

(c) See Fragm. of Ulpian, tit. 15. §. 16.

* *Qui cenſus eſſet*, which Dion explains of him who had an hundred thouſand, that is, of him who had the firſt *cenſus*, as we may ſee in Livy, lib i. and Dionyſius Halicarnaſſeus.

† The ſame difference occurs in ſeveral regulations of the Papian law. See the Fragments of Ulpian, §. 4. 5. & 6.

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will of their husbands; they even might, when they had children, receive in virtue of the will of ſtrangers. All this was in direct oppoſition to the regulations of the Voconian law; and yet it is remarkable, that the ſpirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one child * to receive an entire inheritance by the will of a ſtranger, granted the ſame favour to the wife only when ſhe had three children (a).

It muſt be remarked, that the Papian law did not render the women who had three children, capable of ſucceeding, except in virtue of the will of ſtrangers; and that with reſpect to the ſucceſſion of relations, it left the ancient laws, and particularly the (b) Voconian, in all their force. But this did not long ſubſiſt.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a ſtop to the luxury of women was no longer minded. Aulus Gellius, who lived under (c) Adrian, tells us, that in his time the Voconian law was almoſt aboliſhed; it was buried under the opulence of the city. Thus we find in the ſentences of Paulus (d), who lived under Niger, and in the fragments of Ulpian (e), who was in the time of Alexander Severus, that the ſiſters on the father's ſide might ſucceed, and that none but the relations of a more diſtant degree were in the caſe of thoſe prohibited by the Voconian law.

We find (f) by the proceedings of Verres, that the prætors extended, or reſtrained the Voconian law at pleaſure. The ancient laws of Rome began to be thought ſevere. The prætors, moved by nothing but reaſons of equity, moderation, and decorum, enervated all theſe laws. This is becauſe the great advantages reſulting from laws lie often cloſely concealed,

(a) See Law 9. C. Theod. *de bonis proſcriptorum*, & Dion. lib. lv. See the Fragm. of Ulpian, tit. laſt, §. 6. and tit. 29. §. 3.

(b) Fragm. of Ulpian, tit. 16. §. 1. Sozomenus, lib. i. cap. 9.

(c) Lib. xx. cap. 1.

(d) Lib. iv. tit. 8. §. 3.

(e) Tit. 26. §. 6.

(f) Cicero's Oration againſt Verres.

* *Quod tibi filiolus, vel filia naſcitur, ex me*
Jura Parentis habes, propter me ſcriberis hæres. Juvenal Sat. 9.

concealed, while the little inconveniences that attend them are moſt ſenſibly felt.

We have ſeen that by the ancient laws of Rome mothers had no ſhare in the inheritances of their children. The Voconian law afforded a new reaſon for their excluſion. But the emperor Claudius gave the mother the ſucceſſion of her children as a conſolation for their loſs. The Tertullian ſenatus-conſultum, made under Adrian*, gave it them when they had three children, if free-women; or four, if they were freed women. It is evident, that this decree of the ſenate, was only an extenſion of the Papian law, which in the ſame caſe had granted to women the inheritances left them by ſtrangers. At length Juſtinian (a) granted them the ſucceſſion independently of the number of their children.

(a) Lib. ii. Cod. *de jure liberorum*, Inſtit. tit. 3. §. 4. *de ſenatus conſult.*

The ſame cauſes which had debilitated the law that prevented the ſucceſſion of women, ſubverted that by degrees which had limited the ſucceſſion of the relations of the woman's ſide. Theſe laws were extremely conformable to the ſpirit of a good republic, where they ought to have ſuch an influence, as to prevent this ſex from taking a pride in luxury, in riches, or in the hopes of obtaining riches. On the contrary, the luxury of a monarchy rendering marriage expenſive and coſtly, it ought to be there encouraged; both by the riches which women may beſtow, and by hope of the inheritances it is in their power to procure. Thus when monarchy was eſtabliſhed at Rome, the whole ſyſtem of ſucceſſions was changed. The prætors called the womens relations, in default of thoſe of the males, though by the ancient laws, the relations of the woman's ſide were never called. The Orphitian ſenatus-conſultum called children to the ſucceſſion of their mother; and the emperors Valentinian (b), Theodoſius, and Arcadius, called the grand-children by the

(b) Lib. ix. Cod. *de ſuis & legitimis hæredibus.*

* That is the emperor Pius, who changed his name to that of Adrian by adoption.

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the daughter to the ſucceſſion of the grand-father. In ſhort, the emperor Juſtinian (a) left not the leaſt veſtige of the ancient right of ſucceſſions: he eſtabliſhed three orders of heirs, the deſcendants, the aſcendants, the collaterals, without any diſtinction between the males and females; between the relations on the woman's ſide, and thoſe on the males, and abrogated all thoſe which were ſtill in force: he believed that he followed nature even in deviating from what he called the embarraſſments of the ancient juriſprudence.

(a) L. xiv. Cod. *de ſuis & legitimis hæredibus*, & Nov. 118, & 127.

BOOK XXVIII.

Of the origin and revolutions of the civil laws among the French.

In nova fert animus mutatas dicere formas
Corpora——— OVID METAM.

CHAP. I.

Of the different character of the laws of the ſeveral people of Germany.

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AFTER the Franks had quitted their country, they ordered a digeſt of the Salic laws to be made, by the * ſages of their own nation. The tribe of the Ripuarian Franks having joined itſelf under *Clovis* (b) to that of the Salians, it preſerved its own cuſtoms; and *Theodoric* (c) king of Auſtraſia ordered them to be reduced to writing. He collected likewiſe (d) the cuſtoms of thoſe Bavarians and Germans who were dependent on his kingdom. For

(b) See Gregory of Tours.

(c) See the Prologue to the law of the Bavarians and that to the Salic law.

(d) Ibid.

* See the prologue to the Salic law. Mr. *Leibnitz* ſays in his treatiſe of the origin of the Franks, that this law was made before the reign of *Clovis*: but it could not be before the *Franks* had quitted Germany, for they did not at that time underſtand the Latin tongue.

For Germany having been weakened by the migration of ſuch a multitude of people, the Franks, after conquering all before them, turned back their victorious arms, and extended their dominion into the foreſts of their anceſtors. Very likely the Thuringian Code * was given by the ſame *Theodoric*, ſince the Thuringians were alſo his ſubjects. As the Friſians were ſubdued by *Charles Martel* and *Pepin*, their † law cannot be prior to thoſe princes. Charlemain, the firſt that reduced the Saxons, gave them the law ſtill extant; and we need only read theſe two laſt codes, to be convinced they came from the hands of conquerors. As ſoon as the Viſigoths, the Burgundians, and the Lombards, had founded their reſpective kingdoms, they reduced their laws to writing, not with an intent of obliging the vanquiſhed nations to conform to their cuſtoms, but with a deſign of following them themſelves.

There is an admirable ſimplicity in the Salic and Ripuarian laws, as well as in thoſe of the Alemans, Bavarians, Thuringians, and Friſians. They breathe an original ruſticity, and a ſpirit which no other ſpirit had weakened. They received but very few alterations, becauſe all thoſe people, except the Franks, remained in Germany. Even the Franks themſelves laid there the foundation of a great part of their empire; ſo that they had none but German laws. The ſame cannot be ſaid of the laws of the Viſigoths, of the Lombards and Burgundians; their character altered conſiderably from the great change which happened in the character of thoſe people, who had ſettled in their new habitations.

The kingdom of the Burgundians did not laſt long enough to admit of great changes in the laws of the conquering nation. *Gundebald* and *Sigiſmond*, who collected their cuſtoms, were almoſt the laſt of their kings. The laws of the Lombards received additions

* Lex Angliorum Werinorum, hoc eſt Thuringorum.

† They did not know how to write.

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additions rather than changes. The laws of *Rotharis* were followed by those of *Grimoaldus*, *Luitprandus*, *Rachis*, and *Astulphus*; but did not assume a new form. It was not so with the laws of the Visigoths*; their kings new-moulded them, and had them also new moulded by the clergy.

The kings indeed of the first race struck out of (a) the Salic and Ripuarian laws, whatever was absolutely inconsistent with Christianity; but left the main part untouched. This cannot be said of the laws of the Visigoths.

(a) See the prologue to the law of the Bavarians.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments: These were not tolerated † by the Salic and Ripuarian laws; they preserved their character much better.

The Burgundians, and Visigoths, whose provinces were greatly exposed, endeavoured to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws (b); but as the kings of the Franks were sure of their power, they had no such (c) considerations.

(b) See the prologue to the code of the Burgundians, and the code itself, especially the 12th tit. §. 5. and tit. 38.

The Saxons, who lived under the dominion of the Franks, were of an intractable temper, and prone to revolt. Hence we find in their (d) laws the severities of a conqueror, which are not to be met with in the other codes of the laws of the Barbarians.

See also Gregory of Tours, book 2. chap. 33. and the code of the Visigoths.

We see the spirit of the German laws in the pecuniary punishments, and the spirit of a conqueror in those of an afflictive nature.

The crimes they commit in their own country are subject to corporal punishment; and the spirit of the German laws is followed only in the punishment

(c) See lower down ch. 3.

(d) See ch. 2. § 8. & 9. & ch. 4. § 2, & 7.

* They were made by *Euric*, and amended by *Leovigildus*. See Isidorus's chronicle. *Chaindasuinthus* and *Recessuinthus* reformed them. *Egigas* ordered the code now extant to be made, and commissioned bishops for that purpose; nevertheless, the laws of *Chaindasuinthus* and *Recessuinthus* were preserved, as appears by the sixth Council of Toledo.

† We find a few only in Childbert's decree.

ment of crimes committed beyond the extent of their own territory. Book XXVIII. Chap. 2.

They are plainly told, that their crimes ſhall meet with no mercy, and they are refuſed even the aſylum of churches.

The biſhops had an immenſe authority at the court of the Viſigoth kings; the moſt important affairs being debated in councils. All the maxims, principles, and views of the preſent inquiſition, are owing to the code of the Viſigoths; and the monks have only copied againſt the Jews, the laws formerly enacted by biſhops.

In other reſpects the laws of *Gundebald* for the Burgundians ſeem pretty judicious; and thoſe of Rotharis, and of the other Lombard princes, are ſtill more ſo. But the laws of the Viſigoths, thoſe, for inſtance, of *Receſſuinthus*, *Chaindaſuinthus*, and *Egigas*, are puerile, ridiculous, and fooliſh; they attain not their end; they are ſtuft with rhetoric, and void of ſenſe, frivolous in the ſubſtance, and bumbaſtic in the ſtile.

CHAP. II.

That the laws of the barbarians were all perſonal.

'TIS a diſtinguiſhing character of theſe laws of the barbarians, that they were not confined to a certain diſtrict; the Frank was tried by the law of the Franks, the Aleman by the law of the Alemans, the Burgundian by that of the Burgundians, and the Roman by the Roman law: nay, ſo far were the conquerors in thoſe days from reducing their laws to an uniform ſyſtem or body, that they did not even think of becoming legiſlators to the people they had conquered.

The original of this I find in the manners of the German people. Theſe nations were parted aſunder by marſhes, lakes and foreſts; and Cæſar (a) obſerves, they

(a) De bello Gallico, lib. vi.

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they were fond of ſuch ſeparations. Their dread of the *Romans* brought about their re-union; and yet each individual among theſe mixt people was ſtill to be tried by the eſtabliſhed cuſtoms of his own nation. Each People apart was free and independent, and when come to be intermixt, the independency ſtill continued; the country was common, and the government peculiar; the territory the ſame, and the nations different. The ſpirit of perſonal laws prevailed therefore among theſe people before ever they ſet out from their own homes, and they carried it with them into their conqueſts.

We find this cuſtom eſtabliſhed in the formula's of Marculfus (a), in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians (b), and in the decrees of the kings of the firſt race (c), from whence the capitularies made on that ſubject in the ſecond (d) race were derived. The children (e) followed the law of their father, the wife (f) that of the huſband, the widow came (g) back to her own original law, the freedman (h) was under that of his patron. Beſides every man could make choice of what laws he pleaſed; the conſtitution of (i) Lotharius I. required this choice ſhould be made public.

(a) Lib. 1. formul. 8.
(b) Ch. 31.
(c) That of Clotarius in the year 560. in the edition of the Capitularies of Baluſius, T. i. art. 4. ib. *in fine*.
(d) Capitul. added to the law of the Lombards lib. i. tit. 25. cap. 71. lib. ii. tit. 41. cap. 7. & tit. lvi. cap. 1. & 2.
(e) Ibid. lib. ii. tit. 5.
(f) Ibid. lib. ii. tit. 7. cap. 1.
(g) Ibid. cap. ii.
(h) Ibid. lib. ii. tit. 35. c. 2.
(i) In the law of the Lombards lib. ii. tit. 57.

CHAP. III.

Capital Difference between the Salic laws, and thoſe of the Viſigoths *and* Burgundians.

WE have already obſerved, that the laws of the Burgundians and Viſigoths were impartial; not ſo the Salic law, for it eſtabliſhed between the Franks and Romans the moſt mortifying diſtinctions. When a Frank, a Barbarian, or one living under the Salic law happened to be killed, a compoſition of 200 ſols was to be paid to his relations (k); only 100 upon the killing of a Roman poſſeſſor *, and no

(k) Salic law, tit. xliv. §. 1.

* Qui res in pago ubi remanet proprias habet. Salic law, tit. 44. §. 15. See alſo §. 7.

no more than 42 for a Roman tributary. The compoſition for the murder of one of the king's vaſſals, if a Frank *, was 600 ſols; of a Roman, though the king's gueſt †, only 300 §. The Salic law made therefore a cruel diſtinction between the Frank and Roman lord, and the Frank and Roman commoner.

Farther, if a number of people were got together to aſſault a Frank in his houſe (a), and he happened to be killed, the Salic law ordained a compoſition of 600 ſols; but if a Roman or a freedman ‖ was aſſaulted, only half that compoſition. By the ſame law (b), if a Roman put a Frank in irons, he was liable to a compoſition of 30 ſols; but if a Frank had thus uſed a Roman, he paid only 15. A Frank ſtript by a Roman was entitled to a compoſition of 62½ ſols, and a Roman ſtript by a Frank, received only 30. Such unequal treatment muſt needs have been very grievous to a Roman.

(a) Ibid. tit. 45.

(b) Tit. 35. §. 3. &. 4.

And yet a celebrated author (c), forms a ſyſtem of *the eſtabliſhment of the Franks in Gaul*, on a ſuppoſition that they were the beſt friends of the Romans. The Franks were then the beſt friends of the Romans, they who did them §, and they who ſuffered, ſuch an infinite deal of miſchief: The Franks, the friends of the Romans, they who after ſubduing them by their arms oppreſſed them in cold blood by their laws. They were exactly the friends of the Romans, as the Tartars who conquered China, were the friends of the Chineſe.

(c) The Abbe du Bos.

If ſome Catholic biſhops thought fit to make uſe of the Franks in deſtroying the Arian kings, does

* Qui in truſte dominicâ eſt. Ibid. tit. 44. §. 4.

† *Si Romanus homo conviva regis fuerit.* Ibid. §. 6.

§ The principal Romans followed the court, as may be ſeen by the lives of ſeveral biſhops, who were there educated; there were hardly any but Romans that knew how to write.

‖ Lidus, whoſe condition was better than that of a bondman. Law of the Alemans, chap. 95.

‡ Witneſs the expedition of Arbogeſtes in Gregory of Tours, Hiſt. lib. ii.

BOOK XXVIII. Chap. 4.

it follow, that they had a desire of living under those barbarous people? And can we from hence conclude, that the Franks had any particular regard for the Romans? I should draw quite different consequences; the securer the Franks were of the Romans, the less indulgence they had for them.

The Abbe du Bos has consulted but indifferent authorities for his history, such as poets and orators: works of parade and ostentation are improper foundations for building systems.

CHAP. IV.

In what manner the Roman *law came to be lost in the country of the domain of the* Franks, *and preserved in that of the domain of the* Goths *and* Burgundians.

WHAT has been above said will throw some light upon other things, which have hitherto lain in great obscurity.

The country at this day called France, was, under the first race, governed by the Roman law, or the Theodosian code, and by the different laws of the Barbarians *, who settled in those parts.

In the country of the domain of the Franks, the Salic law was established for the Franks, and the † Theodosian code for the Romans. In that of the domain of the Visigoths, a compilement of the Theodosian code, made by order of Alaric §, regulated disputes among the Romans; the national customs which Euric ‖ caused to be reduced to writing, determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks,

* The Franks, Visigoths, and Burgundians.

† It was finished in 438.

§ The 20th year of the reign of this prince, and published two years after by Anian, as appears by the preface to that code.

‖ The year 504 of the Spanish æra, the Chronicle of Isidorus.

Franks, and the Roman law gradually declined, whilſt in the juriſdiction of the Viſigoths the Roman law ſpread itſelf, and obtained at laſt a general ſway?

My anſwer is, that the Roman law came to be diſuſed among the Franks, becauſe of the great advantages accruing from being a Frank, a Barbarian*, or a perſon living under the Salic law, every one in that caſe readily quitting the Roman to live under the Salic law. The † clergy alone retained it, as a change would be of no advantage to them. The difference of conditions and ranks conſiſted only in the largeneſs of the compoſitions, as I ſhall ſhew in another place. Now § particular laws allowed the clergy as favourable compoſitions, as thoſe of the Franks; for which reaſon they retained the Roman law. This law brought no hardſhips upon them, and in other reſpects it was propereſt for them, as it was the work of Chriſtian emperors.

On the other hand, in the patrimony of the Viſigoths, as the Viſigoth law (a) gave no civil advantages to the Viſigoths over the Romans, the latter had no temptation to diſcontinue living under their own law, in order to live under another. They retained therefore their own laws, without adopting thoſe of the Viſigoths.

(a) See that law.

This is ſtill further confirmed, in proportion as we proceed. The law of *Gundebald* was extremely impartial,

* Francum aut Barbarum aut hominem qui Salica lege vivit. Salic law, tit. 44. §. 1.

† *According to the Roman law under which the church lived*, as is ſaid in the law of the Ripuarians, tit. 58. §. 1. See alſo the numberleſs authorities on this head produced by Du Cange, under the word *Lex Romana*.

‖ See the Capitularies added to the Salic law in *Lindembrock*, at the end of that law, and the different codes of the laws of the Barbarians, concerning the privileges of eccleſiaſtics in this reſpect. See alſo the letter of Charlemagne to his ſon Pepin king of Italy, in the year 807, in the edition of Baluzius, tom. 1. pag. 462. where it is ſaid, that an eccleſiaſtic ſhould receive a triple compoſition; and the Collection of the Capitularies, lib. v. art. 302. tom. 1. Edition of Baluzius.

Book XXVIII. Chap. 4.

partial, not favouring the Burgundians more than the Romans. It appears by the preamble to that law, that it was made for the Burgundians, and to regulate the diſputes which might ariſe between them and the Romans; and in this laſt caſe the judges were equally divided of a ſide. This was neceſſary for particular reaſons, drawn from the political regulation of thoſe times *. The Roman law was continued in Burgundy, in order to regulate the diſputes of Romans among themſelves. The latter had no inducement to quit their own law, as in the country of the Franks; and the rather as the Salic law was not eſtabliſhed in Burgundy, as appears by the famous letter which *Agobard* wrote to *Lewis the Pious*.

(a) Agob. opera.

Agobard (a) deſired that prince to eſtabliſh the Salic law in Burgundy; conſequently it had not been eſtabliſhed there at that time. Thus the Roman law did, and ſtill does ſubſiſt in ſo many provinces, which formerly depended on this kingdom.

The Roman and Gothic laws continued likewiſe in the country of the eſtabliſhment of the Goths; where the Salic law was never received. When *Pepin* and *Charles Martel* expelled the Saracens, the towns and provinces which ſubmitted to theſe princes †, petitioned for a continuance of their own laws, and obtained it: this, in ſpite of the uſages of thoſe times when all laws were perſonal, ſoon made the Roman law to be conſidered as a real and territorial law in theſe countries.

This

* Of this I ſhall ſpeak in another place.

‡ Catel, Hiſt. of Languedoc produces to the purpoſe a chronicle of the year 759. *Franci Narbonam obſident, datoque ſacramento Gothis, ut ſi civitatem traderent partibus Pipini, permitterent eos legem ſuam habere: Quo facto, Gothi Saracenos occiderunt, & civitatem partibus Pipini reddiderunt.*

This appears by the edict of *Charles the Bald*, given at Piſtes in the year 864, which * diſtinguiſhes the countries where cauſes were decided by the Roman law, from where it was otherwiſe. Book XXVIII. Chap. 5.

The edict of Piſtes ſhews two things, one that there were countries where cauſes were decided by the Roman law, and others where there were not; and the other, that thoſe countries where the Roman law obtained, were preciſely (a) the ſame where it is ſtill followed at this very day, as appears by the ſame edict: Thus the diſtinction of the provinces of France, *under cuſtom*, and thoſe *under written law*, was already eſtabliſhed at the time of the edict of Piſtes.

(a) See Art. 12. & 16. of the edict of Piſtes *in Cavilono, in Narbonâ*, &c.

I have obſerved, that in the beginning of the monarchy, all laws were perſonal: and thus when the edict of Piſtes diſtinguiſhes the countries of the Roman law, from thoſe which were not; the meaning is, that in countries which were not of the Roman law, ſuch a number of people had choſen to live under ſome or other of the laws of the Barbarians, that there were ſcarce any who would live under the Roman law; and that in the countries of the Roman law there were few who would chuſe to live under the laws of the Barbarians.

I am not ignorant, that what is here advanced will be reckoned new; but if the things I aſſert be true, ſurely they are very ancient. After all, what great matter is it, whether they come from me, from the *Valeſius*'s, or from the *Bignons?*

CHAP. V.

The ſame ſubject continued.

THE law of Gundebald ſubſiſted a long time among the Burgundians, in conjunction with the

* *In illa terra in quâ judicia ſecundum legem Romanam terminantur, ſecundum ipſam legem judicetur; & in illa terra in quâ*, &c. Art. 16. See alſo Art. 20.

BOOK XXVIII. Chap. 6.

the Roman law: it was ſtill in uſe under Lewis the Pious, as Agobard's letter plainly evinces. In like manner, tho' the edict of Piſtes calls the country occupied by the Viſigoths the country of the Roman law, yet the law of the Viſigoths was always in force there; as appears by the ſynod of Troyes held under *Lewis the Stammerer*, in the year 878, that is, fourteen years after the edict of Piſtes.

In proceſs of time the Gothic and Burgundian laws fell into diſuſe even in their own countries; which was owing to thoſe general cauſes that every-where diſpelled the perſonal laws of the Barbarians.

CHAP. VI.

How the Roman *law kept its ground in the domain of the* Lombards.

EVery thing gives way now to my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive which prevailed with the Romans under the Franks to make choice of the Salic law, did not take place in Italy; hence the Roman law maintained itſelf there together with that of the Lombards.

It even fell out, that the latter gave way to the Roman law, and ceaſed to be the law of the governing people; and though it continued to be that of the principal nobility, yet the greateſt part of the cities formed themſelves into republics, and the nobility mouldered away of themſelves, or were deſtroyed *. The citizens of the new republics had no inclination to adopt a law, which eſtabliſhed the cuſtom of judiciary combats, and whoſe inſtitutions retained much of the cuſtoms and uſages of chivalry. As the clergy of thoſe days, a clergy even then ſo powerful in Italy, lived almoſt all under the Roman law,

* See what Machiavel ſays of the ruin of the ancient nobility of Florence.

law, the number of thoſe, who followed the law of the Lombards, muſt have daily diminiſhed.

Beſides, the law of the Lombards had not that extent, that majeſty of the Roman law, which revived to Italy the idea of its univerſal dominion. The law of the Lombards and the Roman law could be then of no other uſe than to furniſh out ſtatutes for thoſe cities that were erected into republics. Now which could better furniſh them, the law of the Lombards that determined on ſome particular caſes, or the Roman law which embraced them all?

CHAP. VII.

How the Roman *law came to be loſt in* Spain.

THINGS happened otherwiſe in Spain. The law of the Viſigoths prevailed, and the Roman law was loſt. *Chaindaſuinthus* * and *Receſſuinthus* † proſcribed the Roman laws, and even forbad citing them in their courts of judicature. *Receſſuinthus* was likewiſe author § of the law which took off the prohibition of marriages between the Goths and Romans. It is evident, that theſe two laws had the ſame ſpirit: this king wanted to remove the principal cauſes of ſeparation, which ſubſiſted between the Goths and the Romans. Now it was thought, that nothing made a wider ſeparation than the prohibition of intercourſe of marriages, and the liberty of living under different laws.

But though the kings of the Viſigoths had proſcribed the Roman law, it ſtill ſubſiſted in the domains they poſſeſſed in South Gaul. Theſe countries being diſtant from the centre of the monarchy,

* He began to reign in the year 642.

† We will no longer be harraſſed neither by foreign nor by the Roman laws. Law of the Viſigoths, lib. ii. tit. 1. §. 9. & 10.

§ *Ut tam Gotho-romanam, quam Romano gotham matrimonio liceat ſociari.* Law of the Viſigoths, lib. iii. tit. 1. chap. 1.

Book XXVIII. Chap. 8.

lived in a ſtate of great independence. We ſee from the hiſtory of *Vamba*, who aſcended the throne in 672, that the natives of the country were become the prevailing party *. Hence the Roman law had great authority, and the Gothic leſs. The Spaniſh laws neither ſuited their manners, nor their actual ſituation; it was poſſible too that the people adhered obſtinately to the Roman law, becauſe they had annexed to it the idea of liberty. Beſides, the laws of *Chaindaſuinthus*, and of *Receſſuinthus*, contained moſt ſevere regulations againſt the Jews; but theſe Jews had a vaſt deal of power in South Gaul. The author of the hiſtory of king *Vamba* calls theſe provinces the brothel of the Jews. When the Saracens invaded theſe provinces, it was by invitation; and who could have given it but the Jews or the Romans? The Goths were the firſt that were oppreſſed, becauſe they were the ruling nation. We ſee in Procopius † that during their calamities they withdrew out of Narbonne Gaul into Spain. Doubtleſs, under this misfortune, they took refuge in thoſe provinces of Spain, which ſtill held out; and the number of thoſe, who in South Gaul lived under the law of the Viſigoths, was thereby greatly diminiſhed.

CHAP. VIII.

A falſe capitulary.

DID not that wretched compiler *Benedictus Levita* attempt to transform this Viſigoth eſtabliſhment, which prohibited the uſe of the Roman law,

* The revolt of theſe provinces was a general defection, as appears by the judgment which follows the hiſtory. Paulus and his adherents were Romans, they were even favoured by the biſhops. Vamba dared not put to death the ſeditious whom he had conquered. The author of the hiſtory calls Narbonne Gaul the nurſery of treachery.

† *Gothi, qui cladi ſuperfuerant, ex Gallia cum uxoribus liberiſque egreſſi in Hiſpaniam, ad Teudim jam palam tyrannum ſe receperunt.* De Bello Gothorum, lib. i. cap. 13.

law, into a capitulary (a), aſcribed ſince to Charlemagne? He made of this particular law a general one, as if he intended to exterminate the Roman law throughout the univerſe.

BOOK XXVIII. Chap. 9.

(a) Capitularies, lib. vi. cap. 269. of the year 1613. edition of Baluzius, pag. 1021.

CHAP. IX.

In what manner the codes of Barbarian laws, and the capitularies came to be loſt.

THE Salic, the Ripuarian, Burgundian, and Viſigoth laws, came by degrees to be diſuſed among the French, in the following manner:

As fiefs were become hereditary, and arriere-fiefs extended, many uſages were introduced, to which theſe laws were no longer applicable. Their ſpirit indeed was preſerved, which was to regulate moſt diſputes by fines. But as the value of money was, doubtleſs, ſubject to change, the fines were alſo changed; and we ſee ſeveral charters *, where the lords fixed the fines, that were payable in their petty courts. Thus the ſpirit of the law was followed, without following the law itſelf.

Beſides, as France found itſelf divided into a number of petty lordſhips, which acknowledged rather a feudal than a political dependence, it was very difficult for only one law to be authoriſed. In fact, it would be impoſſible to ſee it obſerved. The cuſtom no longer prevailed of ſending extraordinary † officers into the provinces, to inſpect into the adminiſtration of juſtice, and political affairs; it appears even by the charters, that when new fiefs were eſtabliſhed, our kings diveſted themſelves of the right of ſending thoſe officers. Thus, when almoſt every thing was become a fief, theſe officers could no longer be employed; there was no longer a common law,

* M. de la Thaumaſſiere has collected many of them. See, for inſtance, chap 61, 66, and others.

† *Miſſi Dominici.*

Book XXVIII. Chap. 9.

law, becauſe no one could enforce the obſervance of it.

The Salic, Burgundian, and Viſigoth laws, were therefore extremely neglected at the end of the ſecond race, and at the beginning of the third they were ſcarce ever mentioned.

Under the firſt and ſecond race, the nation was often aſſembled; that is, the lords and biſhops; the commons were not yet thought on. In theſe aſſemblies attempts were made to regulate the clergy, a body which formed itſelf, if I may ſo ſpeak, under the conquerors, and eſtabliſhed its prerogatives. The laws made in theſe aſſemblies are what we call the capitularies. Hence four things enſued; the laws of fiefs were eſtabliſhed, and a great part of the church revenues was adminiſtred by the laws of fiefs; the clergy made a wider ſeparation, and neglected * thoſe laws of reformation, where they themſelves were not the only reformers; a collection † was made of the canons of councils and of the decretals of popes; and theſe laws the clergy received as coming from a purer ſource. Ever ſince the erection of the grand fiefs, our kings, as we have already obſerved, had no longer any deputies in the provinces to enforce the obſervance of their laws; and

* Let not the biſhops, ſays *Charles the Bald*, in the capitulary of 844. art. 8. under pretence of the authority of making canons, oppoſe this conſtitution, or neglect the obſervance of it. It ſeems he already foreſaw the fall thereof.

† In the collection of canons, a vaſt number of the decretals of popes was inſerted; there were very few in the ancient collection. *Dionyſius Exiguus* put a great many into his: but that of *Iſidorus Mercator* was ſtuffed with genuine and ſpurious decretals. The old collection was in uſe in France till *Charlemagne*. This prince received from the hands of pope Adrian I. the collection of Dionyſius Exiguus, and cauſed it to be accepted. The Collections of *Iſidorus Mercator* appeared in France about the reign of Charlemagne: people grew paſſionately fond of it: to this ſucceeded what we now call *the courſe of canon law*.

and hence it is, that under the third race we find no more mention made of capitularies.

CHAP. X.

The ſame ſubject continued.

SEveral capitularies were added to the law of the Lombards as well as to the Salic and Bavarian laws. The reaſon of this has been a matter of enquiry; but it muſt be ſought for in the thing itſelf. There were ſeveral ſorts of capitularies. Some had relation to political government, others to œconomical, moſt of them to eccleſiaſtical polity, and ſome few to civil government. Thoſe of the laſt ſpecies were added to the civil law, that is, to the perſonal laws of each nation; for which reaſon it is ſaid in the capitularies, that there is nothing ſtipulated (a) therein contrary to the Roman law. In effect thoſe capitularies regarding œconomical, eccleſiaſtical, or political government, had no relation to that law; and thoſe concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged and retrenched. But the adding of theſe capitularies to the perſonal laws, occaſioned, I imagine, the neglect of the very body of the capitularies themſelves: in times of ignorance, the abridgment of a work often cauſes the loſs of the work itſelf.

(a) See the edict of Piſtes, art. 20.

CHAP. XI.

Other cauſes of the diſuſe of the codes of Barbarian laws, as well as of the Roman *law, and of the capitularies.*

WHEN the German nations ſubdued the Roman empire, they learnt the uſe of writing; and, in imitation of the Romans, they wrote down their

BOOK XXVIII. Chap. 11.

their own uſages *, and digeſted them into codes. The unhappy reigns which followed that of *Charlemagne*, the invaſions of the Normans, and the civil wars, plunged the conquering nations again into the darkneſs out of which they had emerged: reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the Barbarians, as well as the Roman law, and the capitularies, fell into oblivion. The uſe of writing was better preſerved in Italy, where reigned the popes and the Greek emperors, where there were flouriſhing cities, and almoſt the only commerce that was carried on in thoſe days. To this neighbourhood of Italy it was owing, that the Roman law was better preſerved in the provinces of Gaul, formerly ſubject to the Goths and Burgundians; and ſo much the more as this law was there a territorial law, and a kind of privilege. It is probable, that the diſuſe of the Viſigoth laws in Spain, proceeded from the want of writing; and by the fall of ſo many laws, cuſtoms were every where eſtabliſhed.

Perſonal laws fell to the ground. Compoſitions, and what they called *Freda* †, were regulated more by cuſtom than by the text of theſe laws. Thus, as in the eſtabliſhment of the monarchy, they had paſſed from German cuſtoms to written laws; ſome ages after, they came back from written laws to unwritten cuſtoms.

* This is expreſly ſet down in ſome preambles to theſe codes: we even find in the laws of the Saxons and Friſians different regulations, according to the different diſtricts. To theſe uſages were added ſome particular regulations, according to the exigency of circumſtances; ſuch were the ſevere laws againſt the Saxons.

† Of this I ſhall ſpeak elſewhere.

CHAP.

CHAP. XII.

Of local cuſtoms. Revolution of the laws of barbarous nations, as well as of the Roman *law.*

BY ſeveral monuments it appears that there were local cuſtoms, as early as the firſt and ſecond race. We find mention made of the *cuſtom of the place* (a), of the *ancient uſage* (b), of the *cuſtom* (c), of the *laws* (d), and of the *cuſtoms*. It has been the opinion of ſome authors, that what went by the name of cuſtoms were the laws of the barbarous nations, and what had the appellation of law was the Roman law. This cannot poſſibly be. King Pepin (e) ordained, that whereſoever there ſhould happen to be no law, cuſtom ſhould be complied with; but that it ſhould never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the Barbarians, is ſubverting all monuments of antiquity, and eſpecially thoſe codes of Barbarian laws that conſtantly affirm the contrary.

So far were the laws of the barbarous nations from being thoſe cuſtoms, that it was theſe very laws as perſonal inſtitutions that introduced them. The Salic law, for inſtance, was a perſonal law; but generally, or almoſt generally, in places inhabited by the Salian Franks, this Salic law how perſonal ſoever, became in reſpect to thoſe Salian Franks, a territorial law, and was perſonal only in regard to thoſe Franks that lived elſewhere. Now, if in a place where the Salic law was territorial, ſeveral Burgundians, Alemans, or even Romans, happened to have frequent diſputes, they muſt have been determined by the laws of thoſe people; and a great number of determinations agreeable to ſome of thoſe laws muſt have introduced new cuſtoms into the country. This explains extremely well the conſtitution

Book XXVIII. Chap. 12.

(a) Preface to *Marculfus*'s Formulæ.

(b) Law of the Lombards, book ii. tit. 58. §. 3.

(c) Law of the Lombards, book ii. tit. 41. §. 6.

(d) Life of S. Leger.

(e) Law of the Lombards, book ii. tit. 41. §. 6.

Book XXVIII. Chap. 12.

ſtitution of Pepin. It was natural that thoſe cuſtoms ſhould affect even the Franks, who lived on the ſpot, in caſes not decided by the Salic law; but it was not natural, that they ſhould prevail over the Salic law itſelf.

Thus there were in each place an eſtabliſhed law, and received cuſtoms which ſerved as a ſupplement to that law when they did not contradict it.

They might even happen to ſupply a law that was no way territorial; and to continue the ſame: example, if a Burgundian was judged by the law of his own nation, in a place where the Salic law was territorial, and the caſe happened not to be explicitly mentioned in the very text of this law, there is no manner of doubt but judgment would have been paſſed upon him according to the cuſtom of the place.

In the reign of king Pepin, the cuſtoms then eſtabliſhed had not the ſame force as the laws; but it was not long before the laws gave way to the cuſtoms. And as new regulations are generally remedies that imply a preſent evil, it may well be imagined that as early as Pepin's time, they began to prefer the cuſtoms to the eſtabliſhed laws.

What has been ſaid, ſufficiently explains the manner in which the Roman law began ſo very early to become territorial, as may be ſeen in the edict of Piſtes; and how the Gothic law continued ſtill in force, as appears by the ſynod of Troyes (a) above-mentioned. The Roman was become the general perſonal law, and the Gothic the particular perſonal law; conſequently the Roman law was territorial. But whence came it, ſome will aſk, that the perſonal laws of the Barbarians fell every where into diſuſe, while the Roman was continued as a territorial law in the Viſigoth and Burgundian provinces? I anſwer, that even the Roman law had very near the ſame fate as the other perſonal laws: otherwiſe we ſhould ſtill have the Theodoſian code in thoſe provinces

(a) See Chap. 5.

vinces where the Roman law was territorial, whereas we have the laws of Juſtinian. Thoſe provinces retained ſcarce any thing more than the name of the country under the Roman or written law, than the natural affection which people have for their laws, eſpecially when they conſider them as privileges, and a few regulations of the Roman law which were not yet forgotten. Sufficient, however, this was to produce ſuch an effect, that when Juſtinian's compilement appeared, it was received in the provinces of the Gothic and Burgundian domain as a written law, whereas it was received only as written reaſon in the ancient domain of the Franks.

CHAP. XIII.

Difference between the Salic *law or that of the* Salian Franks, *and that of the* Ripuarian Franks *and other barbarous nations.*

THE Salic law did not allow of the cuſtom of negative proofs; that is, if a perſon brought a demand or charge againſt another, he was obliged by the Salic law to prove it, and it was not ſufficient for the accuſed to deny it; which is agreeable to the laws of almoſt all the nations in the univerſe.

The law of the Ripuarian Franks had quite a different ſpirit*; it was contented with negative proofs, and the perſon againſt whom a demand or accuſation was brought, might clear himſelf in moſt caſes, by ſwearing in conjunction with a certain number of witneſſes that he had not committed the crime laid to his charge. The number (a) of witneſſes who were obliged to ſwear, increaſed in proportion to the importance of the affair; ſometimes it mounted to (b) ſeventy-two. The laws of the Alemans, Bavarians, Thuringians, Friſians, Saxons, Lombards, and

(a) Law of the Ripuarians, tit. 6, 7, 8, & others.

(b) Ibid. tit. 11, 12, & 17.

* This relates to what Tacitus ſays, that the Germans had common cuſtoms, and particular cuſtoms.

BOOK XXVIII. Chap. 14.

and Burgundians, were formed on the ſame plan as thoſe of the Ripuarians.

I obſerved that the Salic law did not allow of negative proofs. There was one * caſe however, in which they were allowed; but even then they were not admitted alone, and without the concurrence of poſitive proofs. The plaintiff (a) cauſed witneſſes to be heard, in order to ground his action; the defendant produced alſo witneſſes of his ſide, and the judge was to come at the truth by comparing theſe teſtimonies. † This practice was vaſtly different from that of the Ripuarian, and other barbarous laws, where it was cuſtomary for the party accuſed, to clear himſelf by ſwearing he was not guilty, and by making his relations alſo ſwear that he had told the truth. Theſe laws could be ſuitable only to a people remarkable for their natural ſimplicity and candour; we ſhall ſee preſently that the legiſlators were obliged to take proper methods to prevent their being abuſed.

(a) See the 76th tit. of the *Pactus legis Salicæ.*

CHAP. XIV.

Another difference.

THE Salic law did not admit of the trial by combat; though it had been received by the laws of the Ripuarians (b), and of almoſt all (c) the barbarous nations. To me it ſeems, that the law of combat was a natural conſequence, and a remedy of the law which eſtabliſhed negative proofs. When an action was brought, and it appeared that the defendant was going to elude it unjuſtly by an oath, what other remedy was left to a military man §, who

(b) Tit. 32. tit. 57. §. 2. tit. 59. §. 4.

(c) See the note underneath.

*It was when an accuſation was brought againſt an *Antruſtio*, that is, the king's vaſſal, who was ſuppoſed to be poſſeſſed of a greater degree of liberty. See tit. 76. of the *Pactus legis Salicæ.*

† According to the practice now followed in England.

§ This ſpirit appears in the law of the Ripuarians, tit. 59. §. 4. & tit. 67. §. 5. and in the Capitulary of Lewis the Pious, added to the law of the Ripuarians in the year 803. art. 22.

who saw himself upon the point of being confounded, than to demand satisfaction for the wrong done to him; and even for the attempt of perjury. The Salic law, which did not allow of the custom of negative proofs, neither allowed nor had any need of the trial by combat: but the laws of the Ripuarians (a) and of the other barbarous nations *, who allowed the practice of negative proofs, were obliged to establish the trial by combat.

(a) See that law.

Whosoever will please to examine the two famous regulations † of Gundebald king of Burgundy concerning this subject, will find they are derived from the very nature of the thing. It was necessary, according to the language of the Barbarian laws, to rescue the oath out of the hands of a person who was going to abuse it.

Among the Lombards, the law of Rotharis admitted of cases, in which it would not suffer a man who had made his defence by oath, to undergo the fatigue of a duel. This custom spread itself further: (b) we shall see presently the mischiefs that arose from it, and how they were obliged to return to the ancient practice.

(b) See chap. 18. towards the end.

CHAP. XV.

A reflection.

I Do not pretend to deny, but that in the changes made in the code of the barbarian laws, in the regulations added to that code, and in the body of

* The law of the Frisians, Lombards, Bavarians, Saxons, Thuringians, and Burgundians.

† In the law of the Burgundians, tit. 8. §. 1. & 2. on criminal affairs; and tit. 45. which extends also to civil affairs. See also the law of the Thuringians, tit. 1. §. 3. tit. 7. §. 6. and tit. 8; and the law of the Alemans, tit. 89; the law of the Bavarians, tit. 8. chap. 2. §. 6. and chap. 3. §. 1. and tit. 9. chap. 4. §. 4. the law of the Frisians, tit. 11. §. 3. and tit. 14. §. 4. the law of the Lombards, book i. tit. 32. §. 3. and tit. 35. §. 1. and book ii. tit. 35. §. 2.

Book XXVIII. Chap. 16.

the capitularies, it is poſſible to find ſome text, where in fact the trial by combat is not a conſequence of the negative proof. Particular circumſtances might in the courſe of many ages give riſe to particular laws. I ſpeak only of the general ſpirit of the laws of the Germans, of their nature and origin; I ſpeak of the ancient cuſtoms of thoſe people, that were either hinted at or eſtabliſhed by thoſe laws; and this is the only matter in queſtion.

CHAP. XVI.

Of the ordeal or trial by boiling water, eſtabliſhed by the Salic law.

THE Salic law * allowed of the ordeal or trial by boiling water; and as this trial was exceſſively cruel, the law (a) found an expedient to ſoften its rigour. It permitted the perſon who had been ſummoned to make the trial with boiling water, to ranſom his hand, with the conſent of the adverſe party. The accuſer, for a particular ſum determined by the law, might be ſatisfied with the oath of a few witneſſes, declaring that the accuſed had not committed the crime. This was a particular caſe in which the Salic law admitted of the negative proof.

(a) Tit. 56.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accuſer, who would allow the accuſed to make his defence by a negative proof: the plaintiff was at liberty to be ſatisfied with the oath of the defendant, as he was at liberty to forgive him the injury.

(b) Ibid. tit. 56.

The law (b) contrived a medium, that before ſentence paſſed, both parties, the one through fear of a terrible trial, the other for the ſake of a ſmall indemnity, ſhould terminate their diſputes and put an end to their animoſities. 'Tis plain, that when once this negative proof was over, nothing more was

* As alſo ſome other laws of the Barbarians.

was requiſite; and therefore that the practice of legal duels could not be a conſequence of this particular regulation of the Salic law.

CHAP. XVII.

Particular notions of our anceſtors.

'TIS aſtoniſhing that our anceſtors ſhould reſt the honor, fortune, and life of the ſubject, on things that depended leſs on reaſon than hazard; and that they ſhould inceſſantly make uſe of proofs incapable of proving, and that had no manner of connexion either with innocence or guilt.

The Germans who had never been ſubdued*, enjoyed an exceſſive independence. Different families waged war † with each other, to obtain ſatisfaction for murders, robberies, affronts. This cuſtom was moderated by ſubjecting theſe hoſtilities to rules: it was ordained that they ſhould be no longer committed but by the direction and under the * eye of the magiſtrate. This was far preferable to a general licence of annoying each other.

As the Turks in their civil wars, look upon the firſt victory as a deciſion of heaven in favour of the victor; ſo the inhabitants of Germany in their private quarrels, conſidered the event of a combat as a decree of providence, ever attentive to puniſh the criminal or the uſurper.

Tacitus informs us, that when one German nation intended to declare war againſt another, they endeavoured to take ſome priſoner whom they obliged to fight with one of their people, and by the event of this combat they judged of the ſucceſs of

* This appears by what Tacitus ſays, *Omnibus idem habitus.*

† Velleius Paterculus, lib. ii. cap. 118. ſays, that the Germans decided all their diſputes by the ſword.

* See the codes of Barbarian laws, and in reſpect to leſs ancient times, *Beaumanoir* on the cuſtom of *Beauvoiſis.*

Book XXVIII. Chap. 17.

the war. A nation who believed that public quarrels could be regulated by a ſingle combat, might very well think that it was proper alſo for deciding the diſputes of individuals.

(a) Law of the Burgundians, chap. xlv.

Gundebald (a) king of Burgundy was the prince who gave the greateſt ſanction to the cuſtom of legal duels. The reaſon he gives for this ſanguinary law, is mentioned in his edict. *'Tis*, ſays he, *in order to prevent our ſubjects from atteſting by oath what they are not certain of, nay, and what they know to be falſe.* Thus while the clergy (b) declared that an impious law which permitted combats; the Burgundian kings looked upon that as a ſacrilegious law, which authoriſed the taking of an oath.

(b) See the Works of Agobard.

The trial by combat had ſome reaſon for it founded on experience. In a military nation, cowardice ſuppoſes other vices; it is an argument of a perſon's having reſiſted the principles of his education, of his being inſenſible of honor, and of having refuſed to be directed by thoſe maxims which govern other men; it ſhews, that he neither fears their contempt, nor ſets any value upon their eſteem. Men of any tolerable family ſeldom want either the dexterity requiſite to accompany ſtrength, or the ſtrength neceſſary to concur with courage, becauſe as they ſet a value upon honor, they are practiſed of courſe in things without which this honor cannot be obtained. Beſides, in a military nation, where ſtrength, courage, and proweſs are eſteemed, crimes really odious, are thoſe which ariſe from impoſture, fineſſe, and cunning, that is, from cowardice.

With regard to the trial by fire, after the party accuſed had put his hand on a hot iron or in boiling water, they wrapt the hand in a bag which was ſealed up: if after three days there appeared no mark, he was acquitted. Is it not plain, that amongſt a people inured to the handling of arms, the impreſſion made on a rough and callous ſkin by the hot iron, or by boiling water, could not be ſo great as

to

to be seen three days afterwards? And if there appeared any mark, it shewed that the person who had made the trial was an effeminate fellow. Our peasants handle hot iron with their callous hands as much as they please; and, with regard to the women, the hands of those who worked hard, might be very well able to resist hot iron. The ladies * did not want champions to defend their cause; and in a nation where there was no luxury, there was no middle state. Book XXVIII. Chap. 18.

By the law of the (a) Thuringians, a woman accused of adultery was condemned to the trial by boiling water, only when there was no champion to defend her; and the law of the (b) Ripuarians admits of the trial, only when a person had no witnesses to appear in his justification. But a woman, that could not prevail upon any one relation to defend her cause, a man that could not produce one single witness to attest his honesty, were from those very circumstances sufficiently convicted. (a) Tit. 14. (b) Chap. 31. §. 5.

I conclude therefore, that under the circumstances of time in which the trial by combat, and the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were not so productive of injustice as they were in themselves unjust, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

CHAP. XVIII.

In what manner the custom of judicial combats gained ground.

FROM Agobard's letter to Lewis the Pious, it might be inferred, that the custom of judicial combats was not established among the Franks; for after

* See *Beaumanoir* custom of *Beauvoisis*, chap. lxi. See also the law of the Angli, chap. xiv. where the trial by boiling water is only a subsidiary proof.

BOOK XXVIII. Chap. 18.

after having repreſented to this prince the abuſes of the law of Gundebald, he deſires * that private diſputes ſhould be decided in Burgundy by the law of the Franks. But as it is well known from other quarters, that the trial by combat prevailed at that time in France, this has been the cauſe of ſome perplexity. However the difficulty may be ſolved by what I have ſaid; the law of the Salian Franks did not allow of this kind of trial, and that of the Ripuarian Franks (a) did.

(a) See this law, tit. 59. §. 4. & tit. 67. §. 5.

But, notwithſtanding the clamours of the clergy, the cuſtom of judicial combats gained ground continually in France; and I ſhall make it appear preſently, that the clergy themſelves were in great part the occaſion of it.

'Tis the law of the Lombards that furniſhes us with this proof. *There has been long ſince a deteſtable cuſtom introduced*, ſays the preamble to the conſtitution of (b) Otho II. This is, that if the title to an eſtate was ſaid to be forged, the perſon who claimed under that title made oath upon the goſpels that it was genuine, and without any further judgment he took poſſeſſion of the eſtate: ſo that thoſe who would perjure themſelves, were ſure of gaining their point. The emperor Otho I. having cauſed himſelf to be crowned at Rome (c), at the very time that a council was held there under pope John XII. all the lords † of Italy repreſented to the emperor the neceſſity of enacting a law to reform this horrid abuſe. The pope and the emperor were of opinion, that the affair ſhould be referred to the council, which was to be ſhortly held § at Ravenna. There the lords made the ſame repreſentations, and repeated their

(b) Law of the Lombards, book ii. tit. 55. chap. 34.

(c) The year 962.

* *Si placeret Domino noſtro ut eos transferret ad legem Francorum.*

† *Ab Italiæ proceribus eſt proclamatum, ut imperator ſanctus mutatâ lege facinus indignum deſtrueret.* Law of the Lombards, book ii. tit. 55. chap. 34.

§ It was held in the year 967, in the preſence of pope John XIII. and of the emperor Otho I.

their inſtances; but the affair was put off once more under pretence of the abſence of particular perſons When Otho II. and Conrad * king of Burgundy arrived in Italy, they had a conference at Verona †, with the Italian lords §; and at their repeated remonſtrances, the emperor with their unanimous conſent, made a law, that whenever there happened any diſputes about inheritances, and one of the parties inſiſted upon the legality of his title, and the other maintained its being forged, the affair ſhould be decided by combat; that the ſame rule ſhould be obſerved in conteſts relating to fiefs; that the clergy ſhould be ſubject to the ſame law, and ſhould fight by their champions. Here we ſee that the nobility inſiſted on the trial by combat, becauſe of the inconveniency of the proof introduced by the clergy; that notwithſtanding the clamours of this nobility, the notoriouſneſs of the abuſe which called out loudly for redreſs, and the authority of Otho who came into Italy to ſpeak and act as maſter, ſtill the clergy held out in two councils; that the joint concurrence of the nobility and princes having obliged the clergy to ſubmit; the cuſtom of judicial combats muſt have been conſidered as a privilege of the nobility, as a barrier againſt injuſtice, and as a ſecurity of property, and from that very moment this cuſtom muſt have gained ground. This was effected at a time when the power of the emperors was great, and that of the popes inconſiderable; at a time when the Othos came to revive the dignity of the empire in Italy.

I ſhall make one reflection which will corroborate what has been above ſaid, that the cuſtom of negative proofs produced that of judicial combats. The

* Otho the ſecond's uncle, ſon to Rodolphus, and king of Transjuran Burgundy.

† In the year 988.

§ *Cum in hoc ab omnibus imperiales aures pulſarentur.* Law of the Lombards, book ii. tit. 55. chap. 34.

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abuſe complained of to the Othos, was that a perſon who was charged with having a falſe title to an eſtate, defended himſelf by a negative proof, declaring upon the goſpels it was not falſe. What was it they did to reform this abuſe? They revived the cuſtom of judicial combats.

I was in a hurry to ſpeak of the conſtitution of Otho II. in order to give a clear idea of the diſputes between the clergy and the laity of thoſe times. There has been indeed a conſtitution of * Lotharius I, of an earlier date, who, upon the ſame complaints and diſputes, being deſirous of ſecuring the juſt poſſeſſion of property, had ordained that the notary ſhould make oath that the deed or title was not forged; and if the notary ſhould happen to die, the witneſſes ſhould be ſworn who had ſigned it. The evil however ſtill continued, till they were obliged at length to have recourſe to the remedy abovementioned.

Before that time, I find, that in the general aſſemblies held by Charlemain, the nation repreſented to him (a), that in the actual ſtate of things it was extremely difficult, but that either the accuſer or the accuſed muſt forſwear themſelves; and that for this reaſon it was much better to revive the judicial combat, which was accordingly done.

(a) In the law of the Lombards book ii. tit. 55. §. 23.

The uſage of judicial combats gained ground among the Burgundians, and that of the oath was limited. Among the Goths the law of Chaindaſuinthus and Receſſuinthus left not the leaſt veſtige of the trial by combat; this cuſtom had been reſtrained by the clergy: But, in proceſs of time † thoſe

* In the law of the Lombards, book ii. tit. 55. §. 33. In the copy which Muratori made uſe of, it is attributed to the emperor Guido.

† *In palatio quoque* Bera *comes Barcinonenſis, cum impeteretur a quodam* Sunila, *& infidelitatis argueretur, cum eodem ſecundum legem propriam, utpote quia uterque Gothus erat, equeſtri prælio congreſſus eſt & victus.* I cannot recollect where I had this paſſage from.

those people put a ſtop to the violence which they had ſuffered in this reſpect.

The firſt kings of the Lombards gave a check to the (a) cuſtom of judicial combats. Charlemain (b), Lewis the Pious, and the Othos, made divers general conſtitutions, which we find inſerted in the laws of the Lombards, and added to the Salic laws, whereby the practice of legal duels, at firſt in criminal and afterwards in civil affairs, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniences; that of legal duels had its inconveniences alſo: wherefore they often changed according as the one or the other affected them moſt.

On the one hand the clergy were pleaſed to ſee, that in all ſecular affairs people were obliged to have recourſe to the altars*; and on the other, a haughty nobility were fond of maintaining their rights by the ſword.

I would not have it inferred, that it was the clergy who introduced the cuſtom ſo much complained of by the nobility. This cuſtom was derived from the ſpirit of the Barbarian laws, and from the eſtabliſhment of negative proofs. But a practice that contributed to the impunity of ſuch a number of criminals, having given ſome people reaſon to think that it was proper to make uſe of the ſanctity of the churches in order to ſtrike terror into the guilty, and to intimidate perjurers, the clergy maintained this uſage and the practice that attended it; for in other reſpects they were abſolutely averſe to negative proofs. We find in Beaumanoir (c), that this kind of proof was never allowed in eccleſiaſtic courts; which

(a) See in the law of the Lombards, book i. tit. 4. & tit. 9. §. 23. & book ii. tit. 35. §. 4. & 5. & tit. 55. §. 1, 2 & 3. The regulations of Rotharis, and in §. 15. that of Luitprandus.

(b) Ibid. book ii. tit. 55. §. 23.

(c) Chap. 39. pag. 212.

* The judicial oaths were made at that time in the churches, and during the firſt race of our kings there was a chapel ſet apart in the royal palace, for the affairs that were to be thus decided. See the Formulas of Marculfus, book i. chap. 38. The laws of the Ripuarians, tit. 59. §. 4. tit. 65. §. 5. The hiſtory of Gregory of Tours, the Capitulary of the year 803, added to the Salic law.

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which contributed greatly without doubt to its ſuppreſſion, and to weaken in this reſpect the regulation of the codes of the barbarian laws.

This will convince us more ſtrongly of the connexion between the uſage of negative proofs, and that of judicial combats, of which I have ſaid ſo much. The lay-tribunals admitted of both; and both were rejected by the eccleſiaſtic courts.

In chuſing the trial by duel, the nation followed its military ſpirit; for while the trial by duel was eſtabliſhed as a divine deciſion, the trial by the croſs, by cold and boiling water, which had been alſo regarded as divine deciſions, were aboliſhed.

Charlemain ordained, that if any difference ſhould ariſe between his children, they ſhould be terminated by the judgment of the croſs. Lewis the Pious *, confined this judgment to eccleſiaſtic affairs; his ſon Lotharius aboliſhed it in all caſes: nay he aboliſhed † even the trial by cold water.

I do not pretend to ſay, that at a time when ſo few uſages were univerſally received, theſe trials were not revived in ſome churches; eſpecially as they are mentioned in a charter (a) of Philip Auguſtus: but I affirm they were very little uſed. Beaumanoir (b), who lived at the time of St. Lewis, and a little after, enumerating the different kinds of trials, mentions that of judicial combat, but not a word of the others.

(a) In the year 1200.

(b) Cuſtom of Beauvoiſis, chap. 39.

CHAP. XIX.

A new reaſon of the diſuſe of the Salic *and* Roman *laws, as alſo of the Capitularies.*

I Have already mentioned the reaſons that occaſioned the diſuſe of the Salic and Roman laws, as alſo of the Capitularies; here I ſhall add, that the principal

* We find his conſtitutions inſerted in the law of the Lombards, and at the end of the Salic laws.

† In a conſtitution inſerted in the law of the Lombards, book ii. tit. 55. §. 31.

principal cauſe was the great extent given to judiciary combats.

As the Salic laws did not admit of this cuſtom, they became in ſome meaſure uſeleſs, and fell into oblivion. In like manner the Roman laws, which alſo rejected this cuſtom, were laid aſide: their whole attention was then taken up in eſtabliſhing the law of judicial combats, in forming a proper digeſt of the ſeveral caſes that might happen on thoſe occaſions. The regulations of the Capitularies became alſo of no manner of ſervice. Thus it is that ſuch a number of laws loſt all their authority, without our being able to tell the preciſe time it was loſt; they fell into oblivion, without our being able to find any others that were ſubſtituted in their place.

Such a nation had no need of written laws; hence its written laws might very eaſily fall into diſuſe.

If there happened to be any diſputes between two parties, they had only to order a ſingle combat. All they wanted for this, was a good deal of preſumption.

All civil and criminal actions are reduced to facts. 'Tis upon theſe facts they fought; and not only the ſubſtance of the affair, but likewiſe the incidents and imparlances were decided by combat, as Beaumanoir (a) obſerves, who produces ſeveral inſtances.

(a) Chap. 61. pag. 309. & 310.

I find that towards the commencement of the third race, the juriſprudence of thoſe times related entirely to perſonal quarrels, and was governed by the point of honor. If the judge was not obeyed, he inſiſted upon ſatisfaction from the perſon that had contemned his authority. At Bourges, if (b) the provoſt had ſummoned a perſon, and he refuſed to come, his way of proceeding was to tell him, "*I ſent for thee, and thou didſt not think it worth thy while to come; I demand therefore ſatisfaction for this contempt.*" Upon which they fought. Lewis the Fat reformed this cuſtom (c).

(b) Charter of Lewis the Fat in the year 1145, in the Collection of Ordinances.

(c) Ibid.

The

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The cuſtom of legal duels prevailed (d) at Orleans, even in all demands of debt. Lewis the Young declared, that this cuſtom ſhould take place only when the demand exceeded five ſous. This ordinance was a local law; for in St. Lewis's time (e) it was ſufficient that the value was more than twelve deniers. Beaumanoir (f) heard a gentleman of the law affirm, that formerly there had been a bad cuſtom in France, of hiring a champion for a certain time to fight their battles in all cauſes. This ſhews, that the uſage of judiciary combats muſt have had at that time a prodigious extent.

(d) Charter of Lewis the young in the year 1168, in the Collection of Ordinances.

(e) See Beaumanoir, chap. 63, pag. 325.

(f) See the cuſtom of Beauvoiſis, chap. 28. pag. 203.

CHAP. XX.

Origin of the point of honor.

WE meet with inexplicable enigmas in the codes of the laws of the Barbarians. The law of (a) the Friſians allows only half a ſou in compoſition to a perſon that had been ſtruck with a ſtick; and yet for ever ſo ſmall a wound it allows more. By the Salic law, if a freeman gave three blows with a ſtick to another freeman, he paid three ſous; if he drew blood, he was puniſhed as if he had wounded him with ſteel, and he paid fifteen ſous: thus the puniſhment was proportioned to the greatneſs of the wound. The law of the Lombards (b) eſtabliſhed different compoſitions for one, two, three, four blows; and ſo on. At preſent a ſingle blow is equivalent to an hundred thouſand.

(a) Additio ſapientum Willemari, tit. 5.

(b) Book i. tit. 6. §. 3.

The conſtitution of Charlemain inſerted in the law (c) of the Lombards, ordains, that thoſe who were allowed the trial by combat, ſhould fight with baſtons (d). Perhaps this was out of regard to the clergy; or probably, as the uſage of legal duels gained ground, they wanted to render them leſs ſanguinary. The capitulary * of Lewis the Pious allows the liberty of chuſing to fight either with the ſword

(c) Book ii. tit. 5. §. 23.

(d) A Cudgel, or Staff.

* Added to the Salic law in 819.

ſword or baſton. In proceſs of time, none but villains ||| fought with the baſton (a).

Here I ſee the firſt riſe and formation of the particular articles of our point of honor. The accuſer began with declaring in the preſence of the judge, that ſuch a Perſon had committed ſuch an action; and the accuſed made anſwer, that he lied (b); upon which the judge gave orders for the duel. It became then an eſtabliſhed rule, that whenever a perſon had the lye given him, it was incumbent on him to fight.

(a) See Beaumanoir, chap. 64. pag. 328.

(b) Ibid.

Upon a man's (c) declaring he would fight, he could not afterwards depart from his word; if he did, he was condemned to a penalty. Hence this rule enſued, that whenever a perſon had engaged his word, honor forbad him to recal it.

(c) See Beaumanoir, chap. 3. pag. 25.

Gentlemen * fought one another on horſeback, and armed at all points; villains † fought on foot, and with baſtons. Hence it followed, that the baſton was looked upon as the inſtrument of inſults and affronts; ‖ becauſe, to ſtrike a man with it, was treating him like a villain.

None but villains fought with their § face uncovered; ſo that none but they could receive a blow on the face. Therefore a box on the ear became an injury that muſt be expiated with blood, becauſe the perſon who received it, had been treated as a villain.

The ſeveral people of Germany were no leſs ſenſible than we, of the point of honor; nay, they were more ſo. Thus the moſt diſtant relations took a very conſiderable ſhare to themſelves in every affront,

||| An old term for a ſervant.

* See in regard to the arms of the combatants, Beaumanoir chap. 61. pag. 308. & chap. 64. pag. 328.

† Ibid. chap. 64. pag. 328. See alſo the charters of S. Aubin of Anjou, quoted by Galland, pag. 263.

‖ Among the Romans it was not infamous to be beaten with a ſtick, *lege ictus fuſtium, de iis qui notantur infamia.*

§ They had only the baſton and buckler. Beaumanoir, chap. 64. pag. 328.

BOOK XXVIII. Chap. 21.

front, and on this all their codes are founded. The law (a) of the Lombards ordains, that whoſoever goes attended with ſervants to beat a man by ſurpriſe, in order to load him thereby with ſhame, and to render him ridiculous, ſhould pay half the compoſition which he would owe if he had killed him (b); an dif through the ſame motive he tied or bound him, he ſhould pay three quarters of the ſame compoſition.

(a) Book i. tit. 6. §. 1.

(b) Book i. tit. 6. §. 2.

Let us then conclude, that our forefathers were extremely ſenſible of affronts; but that affronts of a particular kind, ſuch as being ſtruck with a certain inſtrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten, and in this caſe, the proportion of the exceſs conſtituted the greatneſs of the outrage.

CHAP. XXI.

A new reflection upon the point of honor among the Germans.

(c) *De moribus Germanorum.*

(d) In the *Pactus legis Salicæ.*

'TWAS a great infamy, ſays Tacitus (c), *among the Germans, for a perſon to leave his buckler behind him in battle; for which reaſon a great many after a misfortune of this kind have deſtroyed themſelves.* Thus the ancient Salic law (d) allows a compoſition of fifteen ſous to any perſon that had been injuriouſly reproached with having left his buckler behind him.

When Charlemain * amended the Salic law, he allowed in this caſe no more than three ſous in compoſition. As this prince cannot be ſuſpected of having had a deſign to enervate the military diſcipline; it is manifeſt that this change was owing to that of the arms, and that from this change of arms a great number of uſages derive their origin.

CHAP.

* We have both the ancient law, and that which was amended by this prince.

CHAP. XII.

Of the manners relative to judicial combats.

OUR connexion with the fair ſex is founded on the happineſs annexed to the pleaſures of ſenſe; on the charms of loving and being beloved; and likewiſe on the deſire of pleaſing the ladies, becauſe they are moſt penetrating judges in reſpect to part of thoſe things which conſtitute perſonal merit. This general deſire of pleaſing produces gallantry, which is not indeed love itſelf, but the delicate, the volatile, the perpetual diſſembler of love. Book XXVIII. Chap. 22.

According to the different circumſtances of every country and age, love inclines more to one of thoſe three things, than to the other two. Now I maintain, that the prevailing ſpirit at the time of our judicial combats, muſt naturally have been that of gallantry.

I find in the law of the Lombards (a), that if one of the two champions was found to have any herbs fit for inchantment about him, the judge ordered them to be taken from him, and obliged him to ſwear he had no more. This law could be founded only on the vulgar opinion; it was fear (which has been ſaid to have invented ſo many things) that made them imagine this kind of deluſion. As in ſingle combats, the champions were armed at all points; and as with heavy arms, both of the offenſive and defenſive kind, thoſe of a particular temper and force were of infinite advantage; the notion of ſome champions having inchanted arms, muſt certainly have turned the brains of a great many people. (a) Book ii. tit. 55. §. 11.

Hence aroſe the marvellous ſyſtem of chivalry. The minds of all ſorts of people quickly imbibed theſe extravagant ideas. Then it was that in romances they beheld knights-errant, necromancers, fairies, winged or intelligent horſes, inviſible or invulnerable men, magicians who concerned themſelves in

Book XXVIII. Chap. 23.

in the birth and education of great perſonages, inchanted and diſinchanted palaces, a new world in the midſt of the old one, and the ordinary courſe of nature left only to the lower claſs of mankind.

Knights-errant always in armour, in a part of the world full of caſtles, forts, and robbers, found honor in puniſhing injuſtice, and in protecting weakneſs. Hence our romances abound with gallantry founded on the idea of love, joined with that of ſtrength and protection.

Such was the original of gallantry, when they formed to their imaginations an extraordinary ſet of men, who at the ſight of virtue joined with beauty and diſtreſs, were inclined to expoſe themſelves to all hazards for their ſake, and to endeavour to pleaſe them in the common actions of life.

Our romances of chivalry flattered this deſire of pleaſing, and communicated to a part of Europe that ſpirit of gallantry, which we may venture to affirm was very little known to the ancients.

The prodigious luxury of that immenſe city Rome, encouraged the idea of ſenſible pleaſures. A certain notion of tranquillity in the fields of Greece, gave riſe to the deſcription * of ſoft and amorous ſentiments. The idea of knights-errant, protectors of the virtue and beauty of the fair-ſex, led people to that of gallantry.

This ſpirit was continued by the cuſtom of tournaments, which uniting the rights of valour and love, added ſtill a great importance to gallantry.

CHAP. XXIII.

Of the code of laws on judicial combats.

SOME perhaps will have a curioſity to ſee this abominable cuſtom of judiciary combat reduced to principle, and to find a code of ſuch extraordinary laws. Men, though reaſonable in the main, reduce,

* See the Greek romances of the middle age.

reduce their very prejudices to rule. Nothing was more contrary to good ſenſe, then thoſe combats: and yet when once this point was laid down, a kind of prudential management was uſed in carrying it into execution. Book XXVIII. Chap. 24.

In order to be thoroughly acquainted with the juriſprudence of theſe times, 'tis neceſſary to read with attention the regulations of St. Lewis, who made ſuch great changes in the judiciary order. Défontaines was cotemporary with that prince: Beaumanoir wrote after * him; and the reſt lived ſince his time. We muſt therefore look for the ancient practice in the amendments that have been made of it.

CHAP. XXIV.

Rules eſtabliſhed in the judicial combat.

WHEN there happened (a) to be ſeveral accuſers, they were obliged to agree among themſelves that the action might be carried on by a ſingle proſecutor; and if they could not agree, the perſon before whom the action was brought, appointed one of them to proſecute the quarrel. (a) Beaumanoir, chap. 6. pag. 40. & 41.

When (b) a gentleman challenged a villain he was obliged to preſent himſelf on foot with buckler and baſton; but if he came on horſeback, and armed like a gentleman, they took his horſe and his arms from him; and ſtripping him to his ſhirt, they obliged him to fight in that condition with the villain. (b) Beaumanoir, chap. 64. pag. 328.

Before the combat the (c) magiſtrates ordered three banns to be publiſhed. By the firſt the relations of the parties were commanded to retire; by the ſecond the people were warned to be ſilent; and the third prohibited the giving any aſſiſtance to either of the parties, under ſevere penalties; nay, even on (c) Ibid. pag. 330.

* In the Year 1283.

BOOK XXVIII. Chap. 24.

pain of death, if by this aſſiſtance one of the combatants ſhould happen to be vanquiſhed.

The officers belonging to the civil magiſtrate (a) guarded the liſt or incloſure where the battle was fought; and in caſe either of the parties declared himſelf deſirous of peace, they took particular notice of the actual ſtate in which things ſtood at that very moment, to the end that they might be reſtored to the ſame ſituation, in caſe they did not come to an accommodation (b).

(a) Ibid.

(b) Ibid.

When the pledges were received either for a crime or for falſe judgment, the parties could not make up the matter without the conſent of the lord: and when one of the parties was overcome, there could be no accommodation without the permiſſion of the count*, which had ſome analogy to our letters of grace.

But if it happened to be a capital crime, and the lord, corrupted by preſents, conſented to an accommodation; he was obliged to pay a fine of ſixty livres, and the right †he had of puniſhing the malefactor devolved to the count.

There were a great many people incapable either of offering, or of accepting battle. But liberty was given them in trial of the cauſe to chuſe a champion; and that he might have a ſtronger intereſt in defending the party, in whoſe behalf he appeared, his hand was cut off if he loſt the battle §.

When capital laws were made in the laſt century againſt duels, perhaps it would have been ſufficient to have deprived a warrior of his military capacity, by the loſs of his hand; nothing in general being a greater

* The great vaſſals had particular privileges.

† Beaumanoir, chap. 64. pag. 330. ſays, he loſt his juriſdiction: theſe words in the authors of thoſe days have not a general ſignification, but a ſignification limited to the affair in queſtion. Déſontaines, chap. 21. art. 29.

§ This cuſtom which we meet with in the capitularies, was ſtill ſubſiſting at the time of Beaumanoir. See chap. 61. pag. 315.

greater mortification to mankind than to ſurvive the loſs of their character. BOOK XXVIII. Chap. 25.

When (a) in capital caſes the duel was fought by champions, the parties were placed where they could not behold the battle; each of them was bound with the cord that was to be uſed at his execution, in caſe his champion was overcome. (a) Beaumanoir, chap. 64. pag. 330.

The perſon who yielded in battle, did not always loſe the point conteſted; if, for inſtance (b), they fought on an imparlance, he loſt only the imparlance. (b) Ibid. chap. 61. pag. 309.

CHAP. XXV.

Of the bounds preſcribed to the cuſtom of judicial combats.

WHEN pledges of battle had been received upon a civil affair of ſmall importance, the lord obliged the parties to withdraw them.

If a fact was notorious (c), for inſtance, if a man had been aſſaſſinated in the open market place, then there was neither a trial by witneſſes, nor by combat; the judge gave his deciſion from the notoriety of the fact. (c) Beaumanoir, chap. 61. pag. 308. ibid. chap. 43. pag. 239.

When the court of a lord had often determined after the ſame manner, and the uſage was thus known (d), the lord refuſed to grant the parties the privilege of duelling, to the end that the uſages might not be altered by the different events of combats. (d) Beaumanoir, chap. 62. pag. 314. See alſo Défontaines, chap. 22. art. 24.

They were not allowed to inſiſt upon duelling but for (e) themſelves, for ſome one belonging to their family, or for their liege lord.

When the accuſed had been acquitted (f), another relation could not inſiſt on fighting him; otherwiſe diſputes would never be terminated. (e) Beaumanoir. chap. 63. pag. 322.

If a perſon appeared again in public, whoſe relations, upon a ſuppoſition of his being murdered, wanted to avenge his death; there was then no (f) Ibid.

Book XXVIII. Chap. 25.

room for a combat: the ſame may be ſaid (a) if by a notorious abſence the fact was proved to be impoſſible.

(a) Ibid.

If a man (b) who had been mortally wounded, had diſculpated before his death the perſon accuſed, and named another, they did not proceed to a duel; but if he had mentioned nobody, his declaration was looked upon only as a forgiveneſs on his death-bed; the proſecution was continued, and even among gentlemen they could make war againſt each other.

(b) Beaumanoir, chap. 63. pag. 323.

When there was a war, and one of their relations had given or received pledges of battle, the right of war ceaſed: for then it was thought that the parties wanted to purſue the ordinary courſe of juſtice, wherefore he that continued the war would have been ſentenced to repair all damages.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into a particular quarrel, to reſtore the courts of judicature to their authority, and to reduce to a civil ſtate thoſe who were no longer governed but by the law of nations.

As there are an infinite number of wiſe things that are managed in a very fooliſh manner; ſo there are many follies that are very wiſely conducted.

(c) Beaumanoir, chap. 63. pag. 324.

When a man (c), who was appealed of a crime, viſibly ſhewed that it had been committed by the appellant himſelf, there could be then no pledges of battle: for there is no criminal but would prefer a duel of uncertain event to a certain puniſhment.

(d) Ibid. pag. 325.

There were no duels (d) in affairs decided by arbiters, or by eccleſiaſtic courts; nor in caſes relating to women's dowries.

A woman, ſays Beaumanoir, *cannot fight*. If a women appealed a perſon without naming her champion; the pledges of battle were not accepted. It was alſo requiſite, that a woman ſhould be authorized

rized (a) by her baron, that is by her husband, to appeal; but she might be appealed without this authority.

If either the appellant (b) or the appellee were under fifteen years of age, there could be no combat. They might order it indeed in disputes relating to orphans, when their guardians or trustees were willing to run the risk of this procedure.

The cases in which a villain was allowed to fight, are, I think, as follows. He was allowed to fight another villain; he was allowed to fight a freeman, or even a gentleman, in case they were appellants; but if he was the appellant (c) himself, the other might refuse to fight; and even the villain's lord had a right to take him out of the court. The villain might by his lord's charter (d) or by usage, fight with any freeman; and the church * pretended to this right for her villains, as a mark of respect † due to her by the laiety.

(a) Ibid. p. 325.

(b) Beaumanoir, chap. 63. p. 323. See also what I have said in the 18th book.

(c) Beaumanoir, chap. 63. p. 322.

(d) Défontaines ch. 22. art. 7.

CHAP. XXVI.

Of the judiciary combat between one of the parties, and one of the witnesses.

BEaumanoir informs us (e) that a person who saw a witness going to swear against him, might elude the second, by telling the judges, that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. They troubled themselves no further about the inquest; for if the witness was overcome, it was decided, that the party had produced a false witness, and he lost his cause.

(e) Chap. 61. p. 315.

It was necessary he should prevent the second witness from swearing; for if he had made his attestation, the affair would have been decided by

* *Habeant bellandi et testificandi licentiam.* Charter of Lewis the fat, in the year 1118.

† Ibidem.

Book XXVIII. Chap. 26.

the depoſition of two witneſſes. But by ſtaying the ſecond, the depoſition of the firſt witneſs was of no manner of uſe.

The ſecond witneſs being thus rejected, the Party was not allowed to produce any others, but he loſt his cauſe: in caſe however there had been no pledges of battle, he might produce other witneſſes.

(a) Chap. 6. p. 39. & 40.

Beaumanoir obſerves, (a) that the witneſs might ſay to the party he appeared for before he made his depoſition: *I do not care to fight for your quarrel, nor to enter into any debate; but if you are willing to ſtand by me, I am ready to tell the truth.* The party was then obliged to fight for the witneſs, and if he happened to be overcome, he did not loſe his cauſe *, but the witneſs was rejected.

This, I believe, was a limitation of the ancient cuſtom; and what makes me think ſo, is, that we find this uſage of appealing the witneſſes, eſtabliſhed in the laws of the (b) Bavarians and (c) Burgundians, without any reſtriction.

(b) Tit. 16. §. 2.

(c) Tit. 45.

I have already made mention of the conſtitution of Gundebald, againſt which Agobard † and S. Avitus ‖ made ſuch loud complaints. "*When the accuſed* (ſays this Prince) *produces witneſſes to ſwear that he has not committed the crime, the accuſer may challenge one of the witneſſes to a combat; for it is very juſt that the perſon who has offered to ſwear, and has declared that he was certain of the truth, ſhould make no difficulty to maintain it.*" Thus the witneſſes were deprived by this king of every kind of ſubterfuge to avoid the judiciary combat.

* But if the battle was fought by champions, the champion that was overcome had his hand cut off.

† Letter to Lewis the pious.

‖ Life of S. Avitus.

CHAP.

CHAP. XXVII.

Of the judicial combat between one of the parties, and one of the lord's peers. Appeal of falſe judgment.

Book XXVIII. Chap. 27.

AS the nature of judicial combats was to terminate the affair for ever, and was incompatible with (a) a new judgment and new proſecutions; an appeal, ſuch as is eſtabliſhed by the Roman and Canon laws, that is, to a ſuperior tribunal in order to rejudge the proceedings of an inferior court, was a thing unknown in France.

(a) Beaumanoir, chap. 2. p. 22.

This is a form of proceeding to which a warlike nation, entirely governed by the point of honor, was quite a ſtranger; and agreeable to this very ſpirit, the ſame methods (b) were uſed againſt the judges, as were allowed againſt the parties.

(b) Beaumanoir ch. 61. p. 312. & ch. 67. p. 338.

An appeal among the people of this nation was a challenge to fight with arms, a challenge decided by blood and not by an invitation to a paper quarrel, the knowledge of which was deferred to ſucceeding ages (c).

(c) Book 2. ch. 15.

Thus St. Lewis in his inſtitutions ſays, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vaſſal (d) wanted to make his complaint of any outrage committed againſt him by his lord, he was firſt obliged to denounce that he quitted his fief; after which he appealed before his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vaſſal, if he appealed him before the count.

(d) Beaumanoir ch. 61 p. 310. & 311. & ch. 67. p. 337.

A vaſſal to appeal his lord of falſe Judgment, was telling him that his ſentence had been falſely and maliciouſly pronounced: now, to utter ſuch words againſt his lord, was in ſome meaſure committing the crime of falſity.

Book XXVIII. Chap. 27.

Hence, inſtead of appealing the lord of falſe judgment who eſtabliſhed and directed the court, they appealed the peers of whom the court itſelf was formed: by this means they avoided the crime of felony; for they inſulted only their peers, with whom they could always account for the inſult.

(a) Beaumanoir ch. 61. p. 313.
(b) Ibid. p. 314.

It was a very (a) dangerous thing to appeal the peers of falſe judgment. If the party waited till judgment was pronounced, he was obliged to fight them all (b), when they offered to make good their judgment. If the appeal was made before all the judges had given their opinion, he was obliged to fight all thoſe who had agreed in their judgment. In order to avoid this danger, it was uſual to petition the lord (c) to give orders that each peer ſhould give his opinion out loud; and when the firſt had pronounced, and the ſecond was going to do the ſame, the party told him that he was a liar, a knave, and a ſlanderer, and then he had to fight only with that peer.

(c) Beaumanoir chap. 61. p. 314.

Défontaines * would have it, that before an appeal was made of falſe judgment, it was cuſtomary to let three judges pronounce; but he does not ſay that it was neceſſary to fight them all three, and much leſs that there was any obligation to fight all thoſe who had declared themſelves of the ſame opinion. Theſe differences ariſe from this, that there were very few uſages exactly in all parts the ſame; Beaumanoir gives an account of what paſſed in the county of Clermont; and Défontaines of what was practiſed in the Vermandois.

(d) Beaumanoir chap. 61. p. 314.

When (d) one of the peers had declared that he would maintain the judgment, the judge ordered pledges of battle to be given, and likewiſe took ſecurity of the appellant that he would maintain his appeal. But the peer who was appealed gave no ſecurity, becauſe he was the lord's vaſſal, and was

* Chap. 22. art. 1, 10, & 11, he ſays only that each of them was allowed a ſmall fine.

was obliged to defend the appeal, or to pay the lord a fine of ſixty livres.

If the (a) appellant did not prove that the judgment was falſe, he paid the lord a fine of ſixty livres, the ſame fine to (b) the peer whom he had appealed, and as much to every one of thoſe who had openly conſented to the judgment.

When a perſon violently ſuſpected of a capital crime, had been taken and condemned, he could make no appeal (c) of falſe judgment: for he would always appeal, either to prolong his life, or to get an abſolute diſcharge.

If a perſon (d) ſaid that the judgment was falſe and bad, and did not offer to make his words good, that is, to fight, he was condemned to a fine of ſix ſous if a gentleman, and to five ſous if a villain, for the injurious expreſſions he had uttered.

The judges or peers (e) who were overcome, forfeited neither life nor limbs; but the perſon who appealed them was puniſhed with death, if it happened to be a capital crime *.

This manner of appealing the peers of falſe judgment, was to avoid appealing the lord himſelf. But if (f) the lord had no peers, or had not a ſufficient number, he might at his own expence hire † peers of his lord paramount; but theſe peers were not obliged to judge if they did not like it; they might declare that they were come only to give their opinion, and in that particular ‖ caſe, while the lord himſelf pronounced ſentence as judge; and if an appeal of falſe judgment was made againſt him, it was his buſineſs to ſtand the appeal.

If

(a) Beaumanoir ib. Défontaines ch. 22. art. 9.

( ) Défontaines ch. 22. art. 9.

(c) Beaumanoir chap. 61. p. 316.

(d) Beaumanoir, chap. 61. pag. 314. and Défontaines, chap. 22. art. 21.

(e) Défontaines ch. 22. art. 7.

(f) Beaumanoir ch. 62. p. 322. Défontaines ch. 22. art. 3.

* See Défontaines chap. 21. art. 11, & 12. and following, who diſtinguiſhes the caſes in which the appellant of falſe judgment loſes his life, the point conteſted, or only the imparlance.

† The count was not obliged to lend any. Beaumanoir chap. 67. p. 337.

‖ No body can paſs judgment in his court, ſays Beaumanoir, chap. 67. p. 336, and 337.

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If the lord happened (a) to be ſo very poor as not to be able to hire peers of his paramount, or if he neglected to aſk for them, or the paramount refuſed to give them, then as the lord could not judge by himſelf, and as no body was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

(a) Beaumanoir chap. 62. p. 322.

This, I believe, was one of the principal cauſes of the ſeparation between the juriſdiction and the fief, from whence aroſe that maxim of the French lawyers, *The fief is one thing, and the juriſdiction another.* For as there were a vaſt number of peers who had no ſubordinate vaſſals under them, they were incapable of holding their court; all affairs were then brought before their lord paramount, and they loſt the privilege of judging, becauſe they had neither power nor will to claim it.

(b) Défontaines ch. 21. art 27, & 28.

All the peers (b) who had agreed to the judgment, were obliged to be preſent when it was pronounced, that they might follow one another, and ſay *Yes* to the perſon who, wanting to make an appeal of falſe judgment, aſked them whether they followed; for Défontaines ſays (c), *that 'tis an affair of curteſy and loyalty, and there is no ſuch thing as evaſion or delay.* From hence, I imagine, aroſe the cuſtom now followed in England, of obliging the jury to be all unanimous in their verdict in caſes relating to life and death.

(c) Ibid. art 28.

Judgment was therefore given according to the opinion of the majority: and if there was an equal diviſion, ſentence was pronounced, in criminal caſes, in favour of the accuſed; in caſes of debt, in favour of the debtor; and in caſes of inheritance, in favour of the defendant.

(d) Ch. 21. art. 37.

Défontaines obſerves (d), that a peer could not excuſe himſelf by ſaying, that he would not ſit in court if there were only four *, or if the whole number,

* This number at leaſt was neceſſary. Défontaines, chap. 21, art. 36.

number, or at leaſt the wiſeſt part, were not preſent. This is juſt as if he was to ſay in the heat of an engagement, that he would not aſſiſt his lord, becauſe he had not all his vaſſals with him. But it was the lord's buſineſs to cauſe his court to be reſpected, and to chuſe the braveſt and moſt knowing of his tenants. This I mention in order to ſhew the duty of vaſſals, which was to fight and to judge; and ſuch indeed was this duty, that to judge was all the ſame as to fight. BOOK XXVIII. Chap. 27.

It was lawful for a lord who went to law with his vaſſal in his own court, and was caſt, to appeal one of his tenants of falſe judgment. But as the latter owed a reſpect to his lord for the fealty he had vowed, and the lord on the other hand owed benevolence to his vaſſal for the fealty accepted; hence it was cuſtomary to make a diſtinction between the lord's affirming in general, that the judgment (a) was falſe and bad, and imputing perſonal (b) prevarications to his tenant. In the firſt caſe, he affronted his own court, and in ſome meaſure himſelf, ſo that there was no room for pledges of battle. But there was room in the ſecond, becauſe he attacked his vaſſal's honour; and the perſon overcome, was deprived of life and property, in order to maintain the public tranquillity.

(a) Beaumanoir chap. 67. p. 337.
(b) Ibid.

This diſtinction which was neceſſary in that particular caſe, had afterwards a greater extent. Beaumanoir ſays, that when the appellant of falſe judgment attacked one of the peers by perſonal imputations, then battle enſued; but if he attacked only the judgment, the peer appealed was at liberty (c) to determine the diſpute either by battle, or by law. But as the prevailing ſpirit in Beaumanoir's time was to reſtrain the uſage of judicial combats, and as this liberty which had been granted to the peer appealed, of defending the judgment by combat or not, is equally contrary to the ideas of honor eſtabliſhed in thoſe Days, and to the obligation

(c) Beaumanoir chap. 67. p. 337, & 338.

BOOK XXVIII. Chap. 27.

gation the vaſſal lay under of defending his lord's juriſdiction; I am apt to think that this diſtinction of Beaumanoir's was owing to a new regulation among the French.

I would not have it thought, that all appeals of falſe judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 25th chapter. Here it was the buſineſs of the ſuperior court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of falſe judgment againſt the king's court; becauſe, as there was no one equal to the king, no one could appeal him; and as the king had no ſuperior, none could appeal from his court.

This fundamental regulation which was neceſſary as a political law, diminiſhed alſo as a civil law the abuſes of the judicial proceedings of thoſe times. When a lord was afraid (a) that his court would be appealed of falſe judgment, or perceived that they were determined to appeal; if juſtice required there ſhould be no appeal, he might petition for peers from the king's court, who could not be appealed of falſe judgment. Thus king Philip, ſays Défontaines (b), ſent his whole council to judge an affair in the court of the abbot of Corbey.

(a) Défontaines ch. 22. art. 14.

(b) Ibid.

If the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him: but if there were intermediate lords, he had recourſe to his paramount, going from one lord to another, till he came to the ſovereign.

Thus notwithſtanding they had not in thoſe days neither the practice nor even the idea of our modern appeals, yet they had recourſe to the king, who was the ſource from whence all thoſe rivers flowed, and the ſea into which they returned.

CHAP.

CHAP. XXVIII.

Of the appeal of default of juſtice.

Book XXVIII. Chap. 28.

THE appeal of default of juſtice was when the court of a particular lord deferred, evaded, or refuſed to do juſtice to the parties.

In the ſecond race, tho' the count had ſeveral officers under him, their perſon was ſubordinate, but not their juriſdiction. Theſe officers in their court-days, aſſizes, or *placita*, gave judgment in the laſt reſort as the count himſelf; all the difference conſiſted in the diviſion of the juriſdiction. For inſtance, the count had (a) the power of condemning to death, of judging of liberty and of the reſtitution of goods, which the centenarii had not.

For the ſame reaſon, there were higher cauſes (b) reſerved to the king; namely, thoſe which directly concerned the political order of the ſtate. Such were the diſputes between biſhops, abbots, counts, and other grandees, whom the kings judged together with the great vaſſals *.

What ſome authors have advanced; namely, that an appeal lay from the count to the king's deputy, or *Miſſus Dominicus*, is not well grounded. The count and the *Miſſus* had an equal juriſdiction (c) independent of each other: The whole difference was (d) that the *Miſſus* held his *Placita* or aſſizes four months in the year, and the count the other eight.

If a perſon who had been condemned at an aſſize †, demanded to have his cauſe tried over again, and was afterwards caſt, he paid a fine of fifteen ſous, or received fifteen blows from the judges who had decided the affair.

When the counts or the king's deputies did not find themſelves able to bring the great lords to reaſon,

(a) Third capitulary of the year 812. art. 3. edition of *Baluzius*, p. 497. and of *Charles the bald*, added to the law of the Lombards, book 2. art. 3.

(b) Third capitulary of the year 812. art. 2. edition of *Baluzius*, p. 497.

(c) See the capitulary of *Charles the bald*, added to the law of the Lombards book 2. art. 3.

(d) Third capitulary of the year 812. art. 8.

* *Cum fidelibus.* Capitulary of Lewis the pious, edition of *Baluzius*, p. 667.

† *Placitum.*

Book XXVIII. Chap. 28.

ſon, they made them give bail or ſecurity *, that they would appear in the king's court: this was to try the cauſe, and not to rejudge it. I find in the capitulary of Metz †, a law, by which the appeal of falſe judgment to the king's court is eſtabliſhed, and all other kinds of appeal proſcribed and puniſhed.

If they refuſed to ſubmit to the judgment of the ſheriffs ‖, and made no complaint, they were impriſoned till they had ſubmitted: but if they complained, they were conducted under a proper guard before the king, and the affair was examined at his court.

There could be hardly any room then for an appeal of default of juſtice. For ſo far was it from being uſual in thoſe days to complain, that the counts and others who had a right of holding aſſizes, were not exact in diſcharging this duty; that (a) on the contrary, it was a general complaint that they were too exact. Hence we find ſuch numbers of ordinances, by which the counts and other officers of juſtice whatſoever, are forbid to hold their aſſizes above thrice a year. It was not ſo neceſſary to chaſtiſe their indolence, as to check their activity.

(a) See the law of the Lombards, book ii. tit. 52. art. 22,

But, after an innumerable multitude of petty lordſhips had been formed, and different degrees of vaſſalage eſtabliſhed, the neglect of certain vaſſals in holding their courts gave riſe to this kind of appeals; § eſpecially as very conſiderable profits accrued to the lord paramount from the ſeveral fines.

As the cuſtom of judicial combats gained every day more ground, there were places, caſes, and times, in which it was difficult to aſſemble the peers, and

* This appears by the formulas, charters, and the capitularies.

† In the year 757, edition of *Baluzius*, pag. 180. art. 9. & 10. and the Synod *apud Vernas* in the year 755. art. 29. edition of Baluzius, pag. 175. Theſe two capitularies were made under king Pepin.

‖ The officers under the count, *Scabini*.

§ There are inſtances of appeals of default of juſtice as early as the time of Philip Auguſtus.

and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable æra in our history; because most of the wars of those days were imputed to a violation of the political law, as the cause or at least the pretence of our modern wars, is the infringement of the law of nations. Book XXVIII. Chap. 28.

Beaumanoir (a) says, that in the case of default of justice, battle was not allowed: the reasons are these, 1. They could not challenge the lord, because of the respect due to his person; neither could they challenge the lord's peers, because the case was clear and they had only to reckon the days of the summons, or of the other delays; there had been no judgment, consequently there could be no appeal of false judgment: in fine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers. (a) Chap. 61. pag. 315.

But (b) as the default was proved by witnesses before the superior court; the witnesses might be challenged, and then neither the lord nor his court were offended. (b) Beaumanoir, chap. 61. pag. 315.

In case the default was owing to the lord's tenants or peers by deferring justice, or by evading judgment after past delays, then these peers were appealed of default of justice before the paramount; and if they were cast, they (c) paid a fine to their lord. The latter could not give them any assistance; on the contrary, he seized their fief till they had each paid a fine of sixty livres. (c) Défontaines, chap. 21. art. 24.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of peers at his court to pass judgment, or when he had not assembled his tenants or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party (d) and not the lord (d) Ibid. art. 31.

Book XXVIII. Chap. 28.

lord was ſummoned, becauſe of the reſpect due to the latter.

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cauſe was remanded to him, and he was likewiſe paid a fine (a) of ſixty livres. But if the default was proved, the penalty (b) inflicted on him was to loſe the judgment of the cauſe, which was to be then tried in the ſuperior court. In fact, the complaint of default was made with no other view.

(a) Beaumanoir, chap. 61. pag. 312.

(b) Défontaines, chap. 21. art. 29.

3. If the lord was ſued * at his own court, which never happened but upon diſputes relating to the fief; after letting all the delays paſs, the lord himſelf (c) was ſummoned before the peers in the ſovereign's name, whoſe permiſſion was neceſſary on that occaſion. The peers did not make the ſummons, becauſe they could not ſummon their lord, but they could ſummon (d) for their lord.

(c) Ibid. chap. 34.

(d) Défontaines, c. 21. art. 9.

Sometimes (e) the appeal of default of juſtice was followed with an appeal of falſe judgment, when the lord had cauſed judgment to be paſſed, notwithſtanding the default.

(e) Beaumanoir, chap. 61. pag. 34.

The vaſſal † who had wrongfully appealed his lord of default of juſtice, was ſentenced to pay a fine according to his lord's pleaſure.

The inhabitants of Gaunt (f) had appealed the earl of Flanders of default of juſtice before the king, for having delayed to give judgment in his own court. Upon examination it was found, that he had

(f) Beaumanoir, chap. 61. p. 318.

* This was the caſe in the famous difference between the lord of Nelle and Joan counteſs of Flanders, under the reign of Lewis VIII. He ſued her in her own court of Flanders, and ſummoned her to give judgment within forty days, and afterwards appealed in default of juſtice to the king's court. She anſwered, he ſhould be judged by his peers in Flanders. The king's court determined that he ſhould not be remanded, and that the counteſs ſhould be ſummoned.

† Beaumanoir, chap. 61. pag. 312. But he that was neither tenant nor vaſſal to the lord, paid only a fine of ſixty livres. Ibid.

had uſed leſs delays than even the cuſtom of the country allowed. They were therefore remanded to him; upon which their effects to the value of ſixty thouſand livres were ſeized. They returned to the king's court in order to have this fine moderated; but it was decided that the earl might inſiſt upon this fine, and even upon more if he pleaſed. Beaumanoir was preſent at thoſe judgments. Book XXVIII. Chap. 29.

4. In other diſputes which the lord might have with his vaſſal, in reſpect to the body or honor of the latter, or to goods that did not belong to the fief, there was no room for an appeal of default of juſtice; becauſe the cauſe was not tried in the lord's court, but in that of the paramount; vaſſals, ſays Défontaines (a), having no power to give judgment on the body of their lord. (a) Chap. 21. art. 35.

I have been at ſome trouble to give a clear idea of thoſe things, which are ſo obſcure and confuſed in old authors, that to draw them from the chaos in which they were involved, may be reckoned a new diſcovery.

CHAP. XXIX.

Epoch of the reign of St. Lewis.

ST. Lewis aboliſhed the judicial combats in all the courts of his domains, as appears by the ordinance (b) he publiſhed on that account, and (c) by *the inſtitutions*.

(b) In the year 1260.

(c) Book i. chap. 2. & 7. & book ii. chap. 10. & 11.

But he did not ſuppreſs them in the courts of his *barons, except in the caſe of appeal of falſe judgment.

A vaſſal could not appeal the court of his lord of falſe judgment, without demanding a judicial combat againſt the judges who had pronounced ſentence. But St. Lewis (d) introduced a practice of appealing of falſe judgment without fighting, a change

(d) Inſtitutions, book i. chap. 6. & book ii. chap. 15.

* As appears every where in the inſtitutions, &c. and Beaumanoir, chap. 61. pag. 309.

BOOK XXVIII. Chap. 29.

change that may be reckoned a kind of revolution.

He declared (a) that there ſhould be no appeal of falſe judgment in the lordſhips of his domains, becauſe it was a crime of felony. In fact, if it was a kind of felony againſt the lord, by a much ſtronger reaſon it was felony againſt the king. But he conſented they might demand an amendment (b) of the judgments paſſed in his courts; not becauſe they were falſe or iniquitous, but becauſe they did ſome prejudice (c). On the contrary, he ordained, that they ſhould be obliged to make an appeal of falſe judgment againſt the courts of the barons (d), in caſe of any complaint.

(a) Ibid. book ii. chap. 15.

(b) Ibid. book i. chap. 78. & book ii. chap. 15.

(c) Ibid. book i. chap. 78.

(d) Ibid. book ii. chap. 15.

It was not allowed by the inſtitutions, as we have already obſerved, to bring an appeal of falſe judgment againſt the courts in the king's domains. They were obliged to demand an amendment before the ſame court; and in caſe the bailiff refuſed the amendment demanded, the king gave leave to make an appeal (e) to his court, or rather, interpreting the inſtitutions by themſelves, to preſent him a (f) requeſt or petition.

(e) Inſtitutions, book ii. chap. 78.

(f) Ibid. chap. 15.

With regard to the courts of the lords, St. Lewis by permitting them to be appealed of falſe judgment, would have the cauſe brought * before the royal tribunal, or that of the lord paramount, not (g) to be decided by duel, but by witneſſes, purſuant to a form of proceeding, the rules of which he laid down in the inſtitutions (h).

(g) Book i. chap. 6. & 47. & book ii. chap. 15. & Beaumanoir, chap. 11. pag. 58.

Thus, whether they could falſify the judgment, as in the courts of the barons, or whether they could not falſify, as in the courts of his domains, he ordained that they might appeal without running the hazard of a duel.

(h) Book i. chap. 1, 2, & 3.

Défontaines (i) gives us the two firſt examples he ever ſaw, in which they proceeded thus without a legal

(i) Chap. 22. art. 16. & 17.

* But if they wanted to appeal without falſifying the judgment, the appeal was not admitted. Inſtitutions, book ii. chap. 15.

legal duel; one in a cauſe tried at the court of St. Quentin, which belonged to the king's domain; and the other in the court of Ponthieu, where the count who was preſent oppoſed the ancient juriſprudence: but theſe two cauſes were decided by law. Book XXVIII. Chap. 29.

Here perhaps it will be aſked, why St. Lewis ordained for the courts of his barons, a different form of proceeding from that which he had eſtabliſhed in the courts of his domains? the reaſon is this: when St. Lewis made the regulations for the courts of his domains, he was not checked or confined in his views; but he had meaſures to keep with the lords who enjoyed this ancient prerogative, that cauſes ſhould not be removed from their courts, unleſs the party was willing to expoſe himſelf to the dangers of an appeal of falſe judgment. St. Lewis preſerved the uſage of this appeal; but he ordained that it ſhould be made without a judicial combat, that is, in order to render the change more inſenſible, he ſuppreſſed the thing and continued the terms.

This regulation was not univerſally received in the courts of the lords. Beaumanoir (a) ſays, that in his time there were two ways of judging; one according to the king's eſtabliſhment, and the other purſuant to the ancient practice; that the lords were at liberty to follow which way they pleaſed; but when they had pitched upon one in any cauſe, they could not afterwards have recourſe to the other. He adds (b), that the count of Clermont followed the new practice, while his vaſſals kept to the old one; but that it was in his power to re-eſtabliſh the ancient practice whenever he pleaſed, otherwiſe he would have leſs authority than his vaſſals.

(a) Chap. 61. pag. 309.

(b) Ibid.

'Tis proper here to obſerve, that France was at that time (c) divided into the country of the king's domain, and that which was called the country of the barons, or the baronies, and to make uſe of the terms of St. Lewis's inſtitutions, into the country under obedience to the king, and the country out of his

(c) See Beaumanoir, Dé fontaines, and the Inſtitutions, book ii. chap. 10, 11, 15. & others.

Book XXVIII. Chap. 30.

his obedience. When the kings made ordinances for the country of their own domain, they employed their own ſingle authority. But when they publiſhed any ordinances that concerned alſo the country of their barons, they were made * in concert with them, or ſealed and ſubſcribed by them: otherwiſe the barons received or refuſed them, according as they ſeemed conducive to the good of their baronies. The rear-vaſſals were upon the ſame terms with the great vaſſals. Now the inſtitutions were not made with the conſent of the lords, though they regulated matters that to them were of great importance: but they were received only by thoſe who believed they would redound to their advantage. Robert, ſon of St. Lewis received them in his county of Clermont; yet his vaſſals did not think proper to conform to this practice.

CHAP. XXX.

Obſervations on appeals.

I Apprehend that appeals, which were challenges to a combat, muſt have been made immediately on the ſpot. *If the party leaves the court without appealing*, ſays Beaumanoir (a), *he loſes his appeal, and the judgment ſtands good.* This continued ſtill in force, even after all the reſtrictions of (b) judicial combats.

(a) Chap. 63. pag. 327. ibid. chap. 61. pag. 312.

(b) See the Inſtitutions of St. Lewis, book ii. chap. 15. the Ordinance of Charles VII. in the year 1453.

* See the ordinances at the beginning of the third race in the collection of Lauriere, eſpecially thoſe of Philip Auguſtus, on eccleſiaſtic juriſdiction, and that of Lewis VIII. concerning the Jews, and the charters related by Mr. Bruſſel, particularly that of St. Lewis, on the leaſe and recovery of lands, and the feodal majority of young women, tom. ii. book 3. pag. 35. & ibid. The ordinance of Philip Auguſtus, p. 7.

CHAP.

CHAP. XXXI.

The ſame ſubject continued.

THE villain could not bring an appeal of falſe judgment againſt the court of his lord. This we learn from Défontaines (a), and it is confirmed moreover by the inſtitutions (b). Hence Défontaines (c) ſays, *between the lord and his villain there is no other judge but God.* Book XXVIII. Chap. 31.

(a) Chap. 21. art. 21. & 22.

(b) Book i. chap. 136.

(c) Chap. ii. art. 8.

It was the cuſtom of judicial combats, that had deprived the villains of the privilege of appealing their lord's court of falſe judgment. And ſo true is this, that thoſe villains *, who by charter or cuſtom had a right to fight, had alſo the privilege of appealing their lord's court of falſe judgment, even though the peers who judged them were † gentlemen: And Défontaines (d) propoſes expedients to gentlemen in order to avoid the ſcandal of fighting with a villain, by whom they had been appealed of falſe judgment.

(d) Chap. xxii. art. 14.

As the practice of judicial combats began to decline, and the uſage of new appeals to be introduced, it was reckoned unjuſt that freemen ſhould have a remedy againſt the injuſtice of the courts of their lords, and the villains ſhould not; wherefore the parliament received their appeals all the ſame as thoſe of freemen.

* Défontaines, chap. 22. art. 7. This article and the 21ſt of the 22d chapter of the ſame author have been hitherto very ill explained. Défontaines does not oppoſe the judgment of the lord to that of the gentleman, becauſe it was the ſame thing; but he oppoſes the common villain to him who had the privilege of fighting.

† Gentlemen may be always appointed Judges. Défontaines, chap. 21. art. 48.

CHAP. XXXII.

The ſame ſubject continued.

Book XXVIII. Chap. 32.

WHEN an appeal of falſe judgment was brought againſt the lord's court, the lord appeared in perſon before his paramount, to defend the judgment of his court. In like manner (a) in the appeal of default of juſtice, the party ſummoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his juriſdiction.

(a) Défontaines, chap. 21. art. 33.

In proceſs of time, as the practice obſerved in thoſe two particular caſes was become general, by the introduction of all ſorts of appeals, it ſeemed very extraordinary that the lord ſhould be obliged to ſpend his whole life in ſtrange tribunals, and for other people's affairs. Philip of Valois (b) ordained, that none but the bailiffs ſhould be ſummoned; and when the uſage of appeals became ſtill more frequent, the parties were obliged to defend the appeal: the fact * of the judge became that of the party.

(b) In the year 1332.

I took (c) notice that in the appeal of default of juſtice, the lord loſt only the privilege of having the cauſe tried in his own court. But if the lord himſelf was ſued as party (d), which was become a very common practice (e), he paid a fine of ſixty livres to the king, or to the paramount, before whom the appeal was brought. From thence aroſe the uſage after appeals had been generally received, of fining the lord upon the amendment of the ſentence of his judge: an uſage which laſted a long time, and was confirmed by the ordinance of Rouſſillon, but fell at length to the ground, through its own abſurdity.

(c) See chap. 30.

(d) Beaumanoir, chap. 61. pag. 312. & 318.

(e) Ibid.

* See the ſituation of things in Boutillier's time, who lived in the year 1402, *Somme Rurale*, book i. pag. 19. & 20.

CHAP.

CHAP. XXXIII.

The ſame ſubject continued.

IN the practice of judicial combats, the perſon who had appealed one of the judges of falſe judgment, might loſe (a) his cauſe by the combat, but could not poſſibly gain it. In fact, the party who had a judgment in his favour, ought not to have been deprived of it by another man's act. The appellant therefore, who had gained the battle, was obliged to fight likewiſe againſt the adverſe party: not in order to know whether the judgment was good or bad (for this judgment was out of the caſe, being reverſed by the combat) but to determine whether the demand was juſt or not; and it was on this new point they fought. From thence proceeds our manner of pronouncing arreſts, *The court annuls the appeal; the court annuls the appeal, and the judgment againſt which the appeal was brought.* In effect, when the perſon who had made the appeal of falſe judgment, happened to be overcome, the appeal was reverſed; when he proved victorious, both the judgment and the appeal were reverſed: then they were obliged to proceed to a new judgment.

Book XXVIII. Chap. 33. & 34.

(a) Défontaines, chap. 21. art. 14.

This is ſo far true, that when the cauſe was tried by inqueſts, this manner of pronouncing did not take place: witneſs what M. de la Roche Flavin (b) ſays, namely, that the chamber of inqueſts could not uſe this form at the beginning of its creation.

(b) Of the parliaments of France, book i. chap. 16.

CHAP. XXXIV.

In what manner the proceedings at law became ſecret.

DUELS had introduced a public form of proceeding, ſo that both the attack and defence were equally known. *The witneſſes*, ſays Beaumanoir (c) *ought to give in their teſtimony in open court.*

(c) Chap. 61. pag. 315.

Book XXVIII. Chap. 34.

Boutillier's commentator ſays, he had learnt of ancient practitioners, and from ſome old manuſcript law-books, that criminal proceſſes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in thoſe days very common. The uſage of writing fixes the ideas, and preſerves the ſecret; but when this uſage is laid aſide, nothing but the publicneſs of the proceeding is capable of fixing thoſe ideas.

And as uncertainty * might eaſily ariſe in reſpect to what had been judged by vaſſals, or pleaded before vaſſals, they could therefore refreſh their memory every time they held a court, by what was called proceedings on record †. In that caſe it was not allowed to challenge the witneſſes to combat; for then there would never be an end of diſputes.

In proceſs of time a ſecret form of proceeding was introduced. Every thing before had been public; every thing now became ſecret; the interrogatories, the informations, the re-examinations, the confronting of witneſſes, the opinion of the attorney-general; and this is the preſent practice. The firſt form of proceeding was ſuitable to the government of that time, as the new form was proper to the new government ſince eſtabliſhed.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that this change was made inſenſibly, and paſſed from one lordſhip to another, in proportion as the lords renounced the ancient courſe of pleading, and that derived from the inſtitutions of St. Lewis was improved. In fact, Beaumanoir ſays (a), that witneſſes were publicly heard only in caſes in which it was allowed to give pledges of battle: in others, they were heard in ſecret, and their depoſitions were reduced

(a) Chap. 39. pag. 218.

* As Beaumanoir ſays, chap. 39. pag. 209.

† They proved by witneſſes what had been already done, ſaid, or decreed in court.

reduced to writing. The proceedings became therefore ſecret, when they ceaſed to give pledges of battle. Book XXVIII. Chap. 35.

CHAP. XXXV.

Of the coſts.

IN former times no one was condemned in France to the payment of coſts (a) in temporal courts. The party caſt was ſufficiently puniſhed by ſentences of pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party who was condemned and deprived of life and fortune, was puniſhed as much as he could be: and in the other caſes of the judicial combat, there were fines ſometimes fixed, and ſometimes dependent on the diſpoſition of the lord, which were ſufficient to make people dread the events of ſuits. The ſame may be ſaid of cauſes that were not decided by combat. As the lord had the chief profits, ſo he was alſo at the chief expence, either to aſſemble his peers, or to enable them to proceed to judgment. Beſides, as diſputes were generally determined on the ſpot, and without that infinite multitude of writings which afterwards followed, there was no neceſſity of allowing coſts to the parties.

(a) Défontaines in his counſel, chap. 22. art. 3. & 8. and Beaumanoir, chap. 33. Inſtitutions, book i. chap. 90.

The cuſtom of appeals naturally introduced that of giving coſts. Thus Défontaines (b) ſays, that when they appealed by written law, that is, when they followed the new laws of St. Lewis, they gave coſts; but that in the uſual cuſtom, which did not permit them to appeal without falſifying the judgment, no coſts were allowed. They obtained only a fine, and the poſſeſſion for a year and a day of the thing conteſted, if the cauſe was remanded to the lord.

(b) Chap. 22. art. 8.

But when the number of appeals increaſed from the new facility of appealing*; when by the frequent uſage

* At preſent when they are ſo inclined to appeal, ſays Boutillier. *Somme Rurale*, book i. tit. 3. pag. 16.

Book XXVIII. Chap 36.

uſage of thoſe appeals from one court to another, the parties were continually removed from the place of their reſidence; when the new method of proceeding multiplied and eternized the ſuits; when the art of eluding the very juſteſt demands was refined; when the parties at law knew how to fly only in order to be followed; when actions proved deſtructive, and pleas eaſy; when the reaſons were loſt in whole volumes of writings; when the world was filled with members of the law, who were ſtrangers both to law and juſtice; when knavery found advice where it found no ſupport; then it was neceſſary to deter litigious people by the fear of coſts. They were obliged to pay coſts for the judgment, and for the means they had employed to elude it. Charles the Fair made a general ordinance on that ſubject (a).

(a) In the year 1324.

CHAP. XXXVI.

Of the public proſecutor.

AS by the Salic, Ripuarian, and other barbarous laws, crimes were puniſhed with pecuniary fines; they had not in thoſe days, as we have at preſent, a public officer who has the care of criminal proſecutions. In effect, the iſſue of all cauſes being reduced to the reparation of damages; every proſecution was in ſome meaſure civil, and might be managed by any one. On the other hand, the Roman law had popular forms for the proſecution of crimes, which were inconſiſtent with the office of a public proſecutor.

The cuſtom of judicial combats was no leſs oppoſite to this idea: for who is it that would chuſe to make himſelf every man's champion againſt all the world?

I find in the collection of formulas, inſerted by Muratori in the laws of the Lombards, that in the ſecond

second race there was an advocate of the public * prosecutor. But whosoever pleases to read the entire collection of those formulas, will find there was a total difference between those officers and what we now call the public prosecutor, our attorney-generals, our king's sollicitors, or our sollicitors of the nobility. The former were rather agents to the public for the management of political and domestic affairs, than for the civil. In fact we do not find in these formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of persons.

Book XXVIII. Chap. 36.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find notwithstanding, in one of those formulas, an advocate of the public prosecutor, who had the liberty to fight. Muratori has placed it just after the constitution (a) of Henry I. for which it was made. In this constitution 'tis said, "That if any man kills "his father, his brother, or any of his other rela- "tions, he shall lose their succession, which shall "pass to other relations, and his own shall go to "the fisc." Now it was in suing for the succession which had devolved to the fisc, that the advocate of the public prosecutor, by whom its rights were defended, had the privilege of fighting: This case fell within the general rule.

We see in those formulas the advocate of the public prosecutor proceeding against (b) a person who had taken a robber, but had not brought him before the count; against another (c) who had raised an insurrection or tumult against the count; against another (d) who had saved a man's life whom the count had ordered to be put to death; against (e) the advocate of some churches, whom the count had commanded to bring a robber before him, but had not obeyed; against (f) another who had revealed the king's secret to strangers; against (g) another who with

(a) See this constitution and this formula in the second volume of the Historians of Italy, pag. 175.

(b) Collection of Muratori, pag. 104. on the 88th law of Charlemain, book i. tit. 26. §. 78.

(c) Another formula, ib. pag. 87.

(d) Ibid. pag. 104.

(e) Ibid. pag. 95.

(f) Ibid. pag. 88.

(g) Ibid. pag. 98.

* *Advocatus de parte publicâ.*

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with open violence had attacked the emperor's deputy; againſt (a) another who had deſpiſed the emperor's letters; and he was proſecuted either by the emperor's advocate, or by the emperor himſelf; againſt (b) another who refuſed to accept of the prince's coin: in fine, this advocate ſued for things which by the law were adjudged to the fiſc. (k).

But, in criminal cauſes, we never meet with the advocate of the public proſecutor; not even where duels are uſed; (c) not even in the caſe of incendiaries; (e) not even when the judge is killed (f) on his bench; not even in cauſes relating to the condition of perſons (g), to liberty and ſlavery (h).

These formulas are made not only for the laws of the Lombards, but likewiſe for the capitularies added to them; ſo that we have no reaſon at all to doubt of their giving us the practice of the ſecond race upon this ſubject.

As the uſage of combats was become more frequent under the third race, it did not allow of any ſuch thing as a public proſecutor. Hence Boutillier, in his *Somme Rurale*, ſpeaking of the officers of juſtice, takes notice only * of the bailiffs, the peers, and ſerjeants.

I find in the laws † of James II. king of Majorca, a creation of the office of the king's attorney ‖ general, with the very ſame ſanctions as are exerciſed at preſent by the officers of that name amongſt us. It is manifeſt that this office was not inſtituted till we had changed the form of our judiciary proceedings.

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(a) Ibid. pag. 132.
(b) Ibid. pag. 132.
(c) Ibid. pag. 137.
(d) Ibid. pag. 147.
(e) Ibid.
(f) Ibid. pag. 168.
(g) Ibid. pag. 134.
(h) Ibid. pag. 107.

* See alſo the Inſtitutions, book i. chap. 1. book ii. chap. 11 & 13. and Beaumanoir, chap. 1. & chap. 61. pag. 308, concerning the manner in which proſecutions were managed in thoſe days.

† See theſe laws in the lives of the ſaints of the month of June, tom. iii. pag. 26.

‖ *Qui continuè noſtram ſacram curiam ſequi teneatur inſtituatur, qui facta & cauſas in ipſa curia promoveat atque proſequatur.*

CHAP. XXXVII.

In what manner the inſtitutions of St. Lewis *fell into oblivion.*

IT was the fate of the inſtitutions, that their origin, progreſs and extinction, were compriſed within a very ſhort period. Book XXVIII. Chap. 37.

I ſhall make a few reflections upon this ſubject. The code we have now under the name of St. Lewis's inſtitutions, was never deſigned as a law for the whole kingdom, though ſuch a deſign is mentioned in the preface to this code. This compilement is a general code, which determines all points relating to civil affairs, to the diſpoſal of property by will or otherwiſe, the dowries and advantages of women, the profits and prerogatives of fiefs, the affairs relating to the civil adminiſtration, *&c.* Now to give a general body of civil laws, at a time when each city, town or village had its cuſtoms, was attempting to ſubvert in one moment all the particular laws that were then in force in every part of the kingdom. To reduce all the particular cuſtoms to a general one, would be a very inconſiderate thing, even at preſent when our princes find in all parts the moſt paſſive obedience. But if it be a rule that we ought not to change when the inconveniencies are equal to the advantages, much leſs ought we to change when the advantages are ſmall and the inconveniencies immenſe. Now if we attentively conſider the ſituation which the kingdom was in at that time, when every lord was puffed up with the notion of his ſovereignty and power, we ſhall find that to attempt a general change of the received laws and cuſtoms, muſt be a thing that could never enter into the heads of thoſe who were then in the adminiſtration.

What I have been ſaying, proves likewiſe that this code of inſtitutions was not confirmed in parliament

Book XXVIII. Chap. 37.

liament by the barons and magiſtrates of the kingdom, as is mentioned in a manuſcript of the town-houſe of Amiens, quoted by Monſ. Ducange (a). We find in other manuſcripts that this code was given by St. Lewis in the year 1270, before he ſet out for Tunis. But this fact is not truer than the other; for St. Lewis ſet out upon that expedition in 1269, as Monſ. Ducange obſerves: from whence he concludes, that this code might have been publiſhed in his abſence. But this, I ſay, is impoſſible. How can St. Lewis be imagined to have pitched upon the time of his abſence for tranſacting an affair which would have been the ſeed of troubles, and might have produced not only changes, but revolutions? An enterpriſe of that kind had need, more than any other, of being cloſely purſued, and could not be the work of a feeble regency, compoſed moreover of lords*, whoſe intereſt it was that it ſhould not ſucceed.

(a) Preface to the Inſtitutions.

Thirdly, I affirm it to be very probable, that the code now extant is quite a different thing from St. Lewis's inſtitutions. This code cites the inſtitutions; therefore it is a work written upon the inſtitutions, and not the inſtitutions themſelves. Beſides, Beaumanoir, who frequently makes mention of St. Lewis's inſtitutions, quotes only ſome particular inſtitutions of that prince, and not this compilement. Défontaines (b), who wrote in that prince's reign, makes mention of the two firſt times that his inſtitutions on judicial proceedings were put in execution, as of a thing long ſince elapſed. The inſtitutions of St. Lewis were prior therefore to the compilement I am now ſpeaking of, which in rigour, and adopting the erroneous prefaces prefixed by ſome ignorant

(b) See above, chap. 30.

* Matthew, abbot of St. Denis, Simon of Clermont count of Nelle, and in caſe of death Philip biſhop of Evreux, and John count of Ponthieu. We have ſeen above in the 30th chapter, that the count of Ponthieu oppoſed the execution of a new judiciary order in his lordſhip. This fact is related by Défontaines.

ignorant persons to that work, could not have been published before the last year of St. Lewis, or even not till after his death.

CHAP. XXXVIII.

The same subject continued.

WHAT is the compilement then which goes at present under the name of St. Lewis's institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks, and yet we see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must return back to those times.

St. Lewis seeing the abuses in the jurisprudence of his time, endeavoured to give the people a dislike to it: With this view he made several regulations for the courts of his domains and for those of his barons. And such was his success, that Beaumanoir (b), who wrote a little after the death of that prince, informs us, that the manner of judging, established by St. Lewis, obtained in a great number of the courts of the barons.

(b) Chap. 61. pag. 309.

Thus this prince attained his end, though his regulations for the courts of the lords were not designed as a general law for the kingdom, but as a model which every one might follow, and would even find an interest in following. He removed the evil by rendering them sensible of the good. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality, to religion, to the public tranquillity, and to the security of person and property; this form was soon adopted, and the other rejected.

To invite when it is improper to constrain, to lead when it is improper to command, is the highest point of ability. Reason has a natural, nay, it has

even

Book XXVIII. Chap. 38.

even a tyrannical ſway; it meets with reſiſtance, but this very reſiſtance is its triumph; for after a ſhort ſtruggle it forces an intire ſubmiſſion.

St. Lewis, in order to give a diſtaſte of the French juriſprudence, cauſed the books of the Roman law to be tranſlated; by which means they were made known to the lawyers of thoſe times. Défontaines, who is the oldeſt * law-writer we have, made great uſe of thoſe Roman laws. His work is in ſome meaſure a reſult of the ancient French juriſprudence, of the laws or inſtitutions of St. Lewis, and of the Roman law. Beaumanoir made very little uſe of the latter; but he reconciled the ancient French laws with the regulations of St. Lewis.

I have a notion therefore that the law book, known by the name of the inſtitutions, was compiled by ſome bailiffs, with the ſame deſign as that of the authors of thoſe two works, and eſpecially of Défontaines. The title of this work mentions, that it is wrote according to the uſage of Paris, of Orleans, and of the court of barony; and the preamble ſays, that it treats of the uſages of the whole kingdom, and of Anjou, and of the court of barony. 'Tis plain, that this work was made for Paris, Orleans, and Anjou, as the works of Beaumanoir and Défontaines were made for the counties of Clermont and of Vermandois; and as it appears from Beaumanoir, that divers laws of St. Lewis had been received in the courts of barony, the compiler was in the right to ſay, that his work related alſo to thoſe courts.

'Tis manifeſt, that the perſon who compoſed this work, compiled the cuſtoms of the country, together with the laws and inſtitutions of St. Lewis. This is a very valuable work, becauſe it contains the ancient cuſtoms of Anjou, the inſtitutions of St. Lewis

* He ſays of himſelf, in his prologue, *Nus lui en prit onques mais cette choſe dont j'ai.*

Lewis as they were then in uſe; and, in fine, the whole practice of the ancient French law.

Nothing can be ſo vague as the title and prologue to thoſe inſtitutions, which muſt certainly have been added by ſome ignorant hand. As firſt, they are the uſages of Paris, of Orleans, and of the court of barony; afterwards they are the uſages of all the temporal courts of the kingdom, and of the provoſtſhip of France; at length they are the uſages of the whole kingdom, and of Anjou, and of the court of barony.

I fancy that St. Lewis cauſed this work to be undertaken, and that it was finiſhed by his ſucceſſor. One or both of thoſe princes ordered ſome cuſtoms of their domains to be reduced to writing; and becauſe theſe cuſtoms were there confounded with the laws lately made by St. Lewis, the work was called St. Lewis's inſtitutions. In fact, ſo great a name muſt have naturally given it a ſanction. All this was publiſhed under a general form; and the whole affair was moſt prudently managed. By reducing them to writing, they became more known; and by giving them a general form, their uſe was more extended. The laws of the kingdom were at that time nothing elſe but the cuſtoms of each place retained in the memories of old men. In this general inſufficiency, every one might find in the new code what was wanting in thoſe laws; this was a ſource from whence they might all draw. The difference between this work, and thoſe of Défontaines and Beaumanoir, is its ſpeaking in imperative terms as a legiſlator; and this might be right, as it was a mixture of written cuſtoms and laws.

CHAP. XXXIX.

The ſame ſubject continued.

THERE was an intrinſic defect in this compilement; it formed an amphibious code,

Book XXVIII. Chap. 39.

where the French and Roman laws were mixed; and where things were joined that were no way relative, but often contradictory to each other. 'Tis impoſſible to form a good ſyſtem of laws from two contrary digeſts.

I am not ignorant that the French courts of vaſſals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing ſentence, by theſe words, *I condemn* (a), or, *I abſolve*, had ſome conformity to the popular judgments of the Romans. But they made very little uſe of that ancient juriſprudence; they rather choſe that which was afterwards introduced by the emperors, and employed it through the whole compilement, in order to regulate, limit, correct and extend the French juriſprudence.

(a) Inſtitutions, book ii. chap. 15.

St. Lewis, as we have already obſerved, had cauſed the works of Juſtinian to be tranſlated, in order to give credit to the Roman law. It was ſoon taught in the ſchools; for they liked it better in its natural form, than in the disfigured ſhape in which it appeared in the new code.

Beſides, this compilement made decrees in reſpect to ſeveral things that no longer exiſted, ſuch as the judgment of peers, judicial combats, private wars, the ſlavery of the Jews, the cruſades, and bondmen. And as the following ages were remarkable for changes, the more changes they made, the more they had occaſion to make; ſo that this code was always leſs fitted to the actual ſtate of things, eſpecially as the local diſpoſitions contained therein were alſo changed.

Farther, the judiciary forms introduced by St. Lewis fell into diſuſe. This prince had not ſo much in view the thing itſelf, that is the beſt manner of judging, as the beſt manner of ſupplying the ancient practice of judging. The principal intent was to give a diſreliſh of the ancient juriſprudence, and the next to form a new one. But when the inconveniencies

veniencies of the latter appeared, another ſoon ſucceeded.

The inſtitutions of St. Lewis did not therefore ſo much change the French juriſprudence, as they afforded the means of changing it; they opened new tribunals, or rather ways to come at them. And when once the acceſs was eaſy to that which was veſted with the general authority, the judgments which before conſtituted only the uſages of a particular lordſhip, formed an univerſal digeſt. By means of the inſtitutions they had obtained general deciſions, which were entirely wanting in the kingdom: when the building was finiſhed, they let the ſcaffold fall to the ground.

Thus the inſtitutions produced effects, which could hardly be expected from a maſter-piece of legiſlation. To prepare great changes, ſometimes whole ages are requiſite; the events ripen, and then revolutions ſucceed.

The parliament gave a final judgment without appeal, in almoſt all the affairs of the kingdom. Before[a] it took cognizance only of diſputes between the dukes, counts, barons, biſhops, abbots, or between the king and his vaſſals *, rather in the relation they had to the political, than to the civil order. They were ſoon obliged to render it permanent, whereas it uſed to be held only a few times in a year; and, in fine, a great number were created, in order to be ſufficient for the deciſion of all manner of cauſes.

(a) See *Dutillet* on the court of peers. See alſo Laroche Flavin, book i. chap. 3. Budeus, & Paulus Emilius.

No ſooner was the parliament become a fixed body, than they began to compile its decrees. *John de Monluc*, under the reign of Philip the Fair, made a collection, which at preſent is known by the name of the *Olim* regiſters.

* Other cauſes were decided by the ordinary tribunals.

CHAP. XL.

In what manner the judiciary forms were borrowed from the decretals.

BOOK. XXVIII. Chap. 40.

BUT how comes it, ſome will ſay, that when the inſtitutions were laid aſide, the judicial forms of the canon law ſhould be preferred to thoſe of the Roman? 'Twas becauſe they had conſtantly before their eyes the eccleſiaſtic courts, which followed the forms of the canon law, and they knew no court that followed thoſe of the Roman law. Beſides, the limits of the ſpiritual and temporal juriſdiction were at that time very little known: there were (a) people * who ſued indifferently, and cauſes that were tried indifferently, in either court. It ſeems (b) as if the temporal juriſdiction reſerved no other cauſes excluſively to itſelf than the judgment of feudal matters †, and of crimes committed by laymen in cauſes not relating to religion. For (c) if on the account of conventions and contracts, they had occaſion to ſue in a temporal court, the parties might of their own accord proceed before the ſpiritual courts; and as the latter had not a power to oblige the temporal court to execute the ſentence, they made people obey by means of excommunications. Under thoſe circumſtances, when they wanted to change the courſe of proceedings in the temporal court, they took that of the ſpiritual courts, becauſe they knew it; and did not meddle with that of the Roman law, becauſe they were ſtrangers to it: for in point of practice, people know only what is practiſed.

(a) Beaumanoir, chap. 11. pag. 458.

(b) See the whole 11th chap. of Beaumanoir.

(c) Beaumanoir, chap. 11. pag. 60.

CHAP.

* Widows, croiſes, &c. Beaumanoir, chap. 11. pag. 58.

† The ſpiritual courts had even laid hold of theſe, under the pretext of the oath, as may be ſeen by the famous Concordat between Philip-Auguſtus, the clergy, and the barons which is found in the ordinances of Lauriere.

CHAP. XLI.

Flux and reflux of the eccleſiaſtic and temporal juriſdiction.

THE civil power being in the hands of an infinite number of lords, it was an eaſy matter for the eccleſiaſtic juriſdiction to gain every day a greater extent. But as the eccleſiaſtic courts weakened thoſe of the lords, and contributed thereby to give ſtrength to the royal juriſdiction, the latter gradually checked the juriſdiction of the clergy. The parliament, which in its courſe of proceedings had adopted whatever was good and uſeful in that of the ſpiritual courts, ſoon perceived nothing elſe but theſe abuſes; and as the royal juriſdiction gained ground every day, it grew every day more capable of correcting them. In fact, they were intolerable; and, without enumerating them, I ſhall refer * the reader to Beaumanoir, to Boutillier, and to the ordinances of our kings. I ſhall mention only two, in which the public intereſt was more concerned. Theſe abuſes we know by the decrees that reformed them: They had been introduced in the times of the darkeſt ignorance, and upon the breaking out of the firſt gleam of light, they vaniſhed. By the ſilence of the clergy it may be preſumed, that they forwarded this reformation: which conſidering the nature of the human mind, deſerves commendation. Every man that died without bequeathing a part of his eſtate to the church, which was called dying *unconfeſſed*, was deprived of the ſacrament, and of chriſtian burial. If he died without making a will, his relations were obliged to prevail upon the biſhop, that he would jointly with them name proper arbi- Book XXVIII. Chap. 41.

* See Boutillier *Somme Rurale*, tit. 9. what perſons are incapable of ſuing in a temporal court; and Beaumanoir, chap. 11. pag. 56. and the regulations of Philip-Auguſtus upon this ſubject; as alſo the regulation between Philip-Auguſtus, the clergy, and the barons.

BOOK XXVIII. Chap. 42.

ters, to determine what ſum the deceaſed ought to have given, in caſe he had made a will. People could not lie together the firſt night of their nuptials, nor even the two following nights, without having previouſly purchaſed leave: theſe indeed were the three propereſt nights to chuſe; for as to the others they were not worth much. All this was redreſſed by the parliament: we find in the (a) gloſſary of the French law, by Ragau, the decree which it publiſhed (b) againſt the biſhop of Amiens.

(a) At the words *Exécuteurs teſtamentaires.*

I return to the beginning of my chapter. Whenever we obſerve, in any age or government, the different bodies of the ſtate endeavouring to increaſe their authority, and to take particular advantages of each other, we ſhould be often miſtaken were we to conſider their encroachments as an evident mark of their corruption. Through a fatality inſeparable from human nature, moderation in great men is very rare: and as it is always much eaſier to puſh on force in the direction in which it moves, than to ſtop its movement, ſo in the ſuperior claſs of people it is leſs difficult, perhaps, to find men extremely virtuous, than extremely prudent.

(b) The 19th of March, 1409.

The ſoul feels ſuch an exquiſite pleaſure in domineering; even thoſe who are lovers of virtue are ſo exceſſively fond of themſelves, that there is no man ſo happy, as not to have ſtill reaſon to miſtruſt his honeſt intentions: and indeed our actions depend on ſo many things, that it is infinitely more eaſy to do good, than to do it well.

CHAP. XLII.

The revival of the Roman *law, and the reſult thereof. Change in the tribunals.*

UPON the diſcovery of Juſtinian's digeſt towards the year 1137, the Roman law ſeemed to riſe out of its aſhes. Schools were then eſtabliſhed in Italy, where it was publickly taught: they had

had already the Juſtinian code, and the *Novels*. I mentioned before, that this code had been ſo favourably received in that country, as to eclipſe the law of the Lombards. Book XXVIII. Chap. 42.

The Italian doctors brought the law of Juſtinian into France, where they had only * the Theodoſian code, becauſe Juſtinian's laws were not made †, till after the ſettlement of the Barbarians in Gaul. This law met with ſome oppoſition; but it ſtood its ground notwithſtanding the excommunications of the popes, who ſupported (a) their own canons. St. Lewis endeavoured to bring it into repute by the tranſlations made by his orders of Juſtinian's works, which are ſtill in manuſcript in our libraries; and I have already obſerved, that they made great uſe of them in compiling the inſtitutions. Philip the Fair ‖ ordered the laws of Juſtinian to be taught, only as written reaſon, in thoſe provinces of France that were governed by cuſtoms; and they were adopted as a law in thoſe provinces where the Roman law had been received.

(a) Decretals, book v. tit. *de privilegiis*, capite *ſuper ſpecula*.

I have already taken notice, that the manner of proceeding by judicial combat, required very little knowledge in the judges: diſputes were decided according to the uſage of each place, and purſuant to a few ſimple cuſtoms received by tradition. In Beaumanoir's time (°) there were two different ways of adminiſtering juſtice; in ſome places they tried by peers §, in others by bailiffs: in following the

(°) Cuſtoms of Beauvoiſis, chap. i. of the office of bailiffs.

* In Italy they followed Juſtinian's code: hence Pope John VIII. in his conſtitution publiſhed after the ſynod of Troyes, makes mention of this code, not becauſe it was known in France, but becauſe he knew it himſelf, and his conſtitution was general.

† This emperor's code was publiſhed towards the year 530.

‖ By a charter in the year 1312, in favour of the univerſity of Orleans, quoted by *Du Tillet*.

§ Among the common people the burghers were tried by burghers, as the feudatary tenants were tried by one another. See La Thaumaſſiere, chap. 19.

Book XXVIII. Chap. 42.

first way, the peers gave judgment * according to the uſage of their court; in the ſecond it was the *prodes homines*, or old men, who pointed out this ſame uſage to the bailiff. This whole proceeding required neither learning, capacity, nor ſtudy. But when the dark code of the inſtitutions made its appearance, when the Roman law was tranſlated, and taught in public ſchools, when a certain art of procedure and juriſprudence began to be formed, when practitioners and civilians were ſeen to riſe; the peers and the *prodes homines* were no longer capable of judging; the peers began to withdraw from the lords tribunals; and the lords were very little inclined to aſſemble them; eſpecially as the new form of trial, inſtead of being a pompous action agreeable to the nobility, and intereſting to a warlike people, was become a courſe of pleading, which they neither underſtood, nor cared to learn. The cuſtom of trying by peers began to † be leſs uſed; that of trying by bailiffs to be more ſo; the bailiffs did not give § judgment themſelves, they ſummed up the evidence and pronounced the judgment of the *prodes homines*; but the latter being no longer capable of judging, the bailiffs themſelves gave judgment.

This

* Thus all requeſts began with theſe words: *My lord judge, it is cuſtomary that in your court*, &c. as appears from the formula, quoted by Boutillier, *Somme Rurale*, book iv. tit. 21.

† The change was inſenſible; we meet with trials by peers even in Boutillier's time, who lived in the year 1402, which is the date of his will: but nothing but feodal matters were tried any longer by the peers. Boutillier, book i. tit. 1. pag. 16.

§ As appears by the formula of the letters which their lord uſed to give them, quoted by Boutillier, *Somme Rurale*, book i. tit. 14. which is proved likewiſe by Beaumanoir, cuſtom of Beauvoiſis, chap. 1. of the bailiffs; they only directed the proceedings, "*The bailiff is obliged in the preſence of the peers to take "down the words of thoſe who plead, and to aſk the parties "whether they are willing to have judgment given according to "the reaſons alledged; and if they ſay, yes, my lord; the bailiff "ought to oblige the peers to give judgment.*" See alſo the Inſtitutions of St. Lewis, book i. chap. 105. and book ii. chap. 15.

This was effected ſo much the eaſier, as they had before their eyes the practice of the eccleſiaſtic courts; the canon and new civil law both concurred alike to aboliſh the peers. BOOK XXVIII. Chap. 43.

Thus fell the uſage hitherto conſtantly obſerved in the French monarchy, that judgment ſhould not be pronounced by a ſingle perſon, as may be ſeen in the Salic laws, the capitularies, and in the firſt law-writers of the third race. The contrary abuſe, which obtains only in local juriſdictions, has been moderated, and in ſome meaſure redreſſed, by introducing in many places a judge's deputy, whom he conſults, and who repreſents the ancient *prodes homines*; by the obligation the judge is under of taking two graduates, in caſes that deſerve a corporal puniſhment; and, in fine, it is become of no manner of effect by the extreme facility of appeals.

(a) Beaumanoir, chap. 67. pag. 336. & chap. 61. pag. 315. & 316. The Inſtitutions, book ii. chap. 15.

CHAP. XLIII.

The ſame ſubject continued.

THUS there was no law to inhibit the lords from holding their courts themſelves; no law to aboliſh the functions of their peers; no law to ordain the creation of bailiffs; no law to give them the power of judging. All this was effected inſenſibly, and by the very neceſſity of the thing. The knowledge of the Roman law, the decrees of the courts, the new digeſts of cuſtoms, required a ſtudy of which the nobility and illiterate people were incapable.

The only (b) ordinance we have upon this ſubject, is that which obliged the lords to chuſe their bailiffs, from among the laity. 'Tis a miſtake to look upon this as the law of their creation; for it ſays no ſuch thing. Beſides, it fixes what it preſcribes, by the reaſons it gives: *to the end that the bailiffs may be puniſhed * for their prevarications, 'tis neceſſary they be*

(b) It was publiſhed in the year 1287.

* *Ut ſi ibi delinquant, ſuperiores ſui poſſint animadvertere in eoſdem.*

Book XXVIII. Chap. 44.

be taken from the order of the laity. The immunities of the clergy in thoſe days are very well known.

We muſt not imagine that the privileges which the nobility formerly enjoyed, and of which they are now diveſted, were taken from them as uſurpations: no, many of thoſe privileges were loſt through neglect, and others were given up, becauſe as various changes had been introduced in the courſe of ſo many ages, they were inconſiſtent with thoſe changes.

CHAP. XLIV.

Of the proof by witneſſes.

THE judges, who had no other rule to go by than the uſages, inquired very often by witneſſes into every cauſe that was brought before them.

The uſage of judicial combats beginning to decline, they made their inqueſts in writing. But a vocal proof committed to writing, is never more than a vocal proof; ſo that this only increaſed the expences of law proceedings. Regulations were then made, which rendered moſt of thoſe inqueſts * uſeleſs; public regiſters were eſtabliſhed which aſcertained moſt facts, as nobility, age, legitimacy, marriage. Writing is a witneſs very hard to corrupt; the cuſtoms were therefore reduced to writing. All this is very reaſonable; it is much eaſier to go and ſee in the baptiſmal regiſter, whether Peter is the ſon of Paul, than to prove this fact by a tedious inqueſt. When there are a great number of uſages in a country, it is much eaſier to write them all down in a code, than to oblige individuals to prove every uſage. At length the famous ordinance was made, which prohibited the admitting of the proof by witneſſes, for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

* See in what manner, age, and parentage were proved, Inſtitutions, book i. chap. 71. & 72.

CHAP.

CHAP. XLV.

Of the cuſtoms of France.

FRANCE, as we have already obſerved, was governed by unwritten cuſtoms; and the particular uſages of each lordſhip conſtituted the civil law. Every lordſhip had its civil law, according to Beaumanoir (a), and ſo particular a law, that this author who is looked upon as a luminary, and a very great luminary, of thoſe times, ſays he does not believe that throughout the whole kingdom, there were two lordſhips entirely governed by the ſame law. Book XXVIII. Chap. 45.

(a) Prologue to the cuſtom of Beauvoiſis.

This prodigious diverſity had a firſt and ſecond origin. With regard to the firſt, the reader may recollect what has been already ſaid concerning it in the (b) chapter of local cuſtoms; and as to the ſecond, we meet with it in the different events of legal duels; it being natural that a continual ſeries of fortuitous caſes muſt have been productive of new uſages.

(b) Chap. 12.

Theſe cuſtoms were preſerved in the memory of old men; but inſenſibly laws or written cuſtoms were formed.

1. At the commencement (c) of the third race the kings gave not only particular charters, but likewiſe general ones, in the manner above explained; ſuch are the inſtitutions of Philip Auguſtus, and thoſe made by St. Lewis. In like manner the great vaſſals, in concurrence with the lords who held under them, granted certain charters or eſtabliſhments, according to particular circumſtances, at the aſſizes of their duchies or counties: ſuch were the aſſize of Godfrey count of Britany, on the diviſion of the nobles; the cuſtoms of Normandy, granted by duke Ralph; the cuſtoms of Champagne, given by king Theobald; the laws of Simon count of Montfort, and

(c) See the collection of ordinances, *by Lauriere.*

and others. This produced ſome written laws, and even more general ones than thoſe they had before.

2. At the beginning of the third race, almoſt all the common people were bond-men; but there were ſeveral reaſons which determined afterwards the kings and lords to infranchiſe them.

The lords by infranchiſing their bond-men gave them property; it was neceſſary therefore to give them civil laws, in order to regulate the diſpoſal of that property. The lords by infranchiſing their bondmen, deprived themſelves of their property; there was a neceſſity therefore of regulating the rights which they reſerved to themſelves, as an equivalent for that property. Both theſe things were regulated by the charters of infranchiſement; thoſe charters formed a part of our cuſtoms, and this part was reduced to writing.

3. Under the reign of St. Lewis, and of the ſucceeding princes, ſome able practitioners, ſuch as Défontaines, Beaumanoir, and others, committed the cuſtoms of their bailiwics to writing. Their deſign was rather to give the courſe of judicial proceedings, than the uſages of their time in reſpect to the diſpoſal of property. But the whole is there; and though theſe particular authors have no authority, but what they derive from the truth and notoriety of the things they ſpeak of, yet there is no manner of doubt, but they contributed greatly to the reſtoration of our ancient French law. Such was in thoſe days our common law.

We are come now to the grand epocha. Charles VII. and his ſucceſſors cauſed the different local cuſtoms throughout the kingdom to be reduced to writing, and preſcribed ſet forms to be obſerved at their digeſting. Now as this digeſting was made through all the provinces, and as people came from each lordſhip to declare in the general aſſembly of the province, the written or unwritten uſages of each place, endeavours were uſed to render the cuſtoms more

more general, as much as poſſible, without injuring the intereſts of individuals, which were carefully * preſerved. Thus our cuſtoms aſſumed three characters; they were committed to writing, they were made more general, and they received the ſtamp of the royal authority.

Many of theſe cuſtoms having been digeſted anew, ſeveral changes were made, either in ſuppreſſing whatever was incompatible with the actual practice of the law, or in adding ſeveral things drawn from this practice.

Though the common law is conſidered amongſt us as in ſome meaſure oppoſite to the Roman, inſomuch that theſe two laws divide the different territories; it is notwithſtanding true that ſeveral regulations of the Roman law entered into our cuſtoms, eſpecially when they made the new digeſts at a period of time not very diſtant from ours, when this law was the principal ſtudy of all thoſe who were deſigned for civil employments; at a time when it was not uſual for people to boaſt of not knowing what it was their duty to know, and of knowing what they ought not to know; at a time when a quickneſs of underſtanding was made more ſubſervient towards learning than pretending to a profeſſion, and when a continual purſuit of amuſements was not even the characteriſtic of women.

What has been hitherto ſaid of the formation of our civil laws, ſeems to lead me naturally to give alſo the theory of our political laws; but this would be too great a work. I am like that antiquarian, who ſet out from his own country, arrived in Egypt, caſt an eye on the pyramids, and returned home.

* This was obſerved at the digeſting of the cuſtoms of Berry and of Paris. See Lathaumaſſiere, chap. 3.

BOOK XXIX.

Of the manner of compoſing laws.

CHAP. I.

Of the ſpirit of the legiſlator.

Book XXIX. Chap. 1. & 2.

I Say it, and methinks I have undertaken this work with no other view than to prove it: the ſpirit of moderation ought to be that of the legiſlator; political, like moral evil, lying always between two extremes. Let us produce an example.

The ſet forms of juſtice are neceſſary to liberty; but the number of them might be ſo great, as to be contrary to the end of the very laws that eſtabliſhed them; proceſſes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The ſubjects would loſe both their liberty and ſecurity; the accuſers would no longer have any means to convict, nor the accuſed to juſtify themſelves.

CHAP. II.

The ſame ſubject continued.

(a) Book xx. chap. 1.

CECILIUS, in Aulus Gellius (a), ſpeaking of the law of the twelve tables, which permitted the creditor to cut the inſolvent debtor to pieces, juſtifies it even by its cruelty, which * hindered people from borrowing beyond their abilities. Shall then

* Cecilius ſays, that he never ſaw nor read of an inſtance, in which this puniſhment had been inflicted; but 'tis likely, that no ſuch puniſhment was ever eſtabliſhed; the opinion of ſome civilians, that the law of the twelve tables meant only the diviſion of the money ariſing from the ſale of the debtor, ſeems very probable.

then the cruelleſt laws be the beſt? Shall goodneſs conſiſt in exceſs, and all the relations of things be deſtroyed? Book XXIX. Chap. 3. & 4.

CHAP. III.

That the laws which ſeem to deviate from the views of the legiſlator are frequently agreeable to them.

THE law of Solon, which declared thoſe perſons infamous who eſpouſed no ſide in an inſurrection, ſeemed very extraordinary; but we ought to conſider the circumſtances in which Greece was at that time. It was divided into very ſmall ſtates: and there was reaſon to apprehend, leſt in a republic, torn by inteſtine diviſions, the ſobereſt part ſhould keep retired, and things by this means ſhould be carried to extremity.

In the ſeditions raiſed in thoſe petty ſtates, the bulk of the citizens, either made or engaged in the quarrel. In our large monarchies, parties are formed by a few, and the people chuſe to live quiet. In the latter caſe it is natural to call back the ſeditious to the bulk of the citizens, and not theſe to the ſeditious: in the other, it is neceſſary to oblige the ſmall number of prudent people to enter among the ſeditious: 'tis thus the fermentation of one liquor may be ſtopt by a ſingle drop of another.

CHAP. IV.

Of the laws that are contrary to the views of the legiſlator.

THERE are laws ſo little underſtood by the legiſlator, as to be contrary to the very end he propoſed. Thoſe who made this regulation among the French, that when one of the two competitors to a benefice died, it ſhould devolve to the ſurvivor, had in view without doubt the extinction of quarrels: but the very reverſe falls out, we ſee the

the clergy at variance every day, and like Engliſh maſtiffs worrying one another to death.

CHAP. V.

The ſame ſubject continued.

BOOK XXIX. Chap. 5.

THE law I am going to ſpeak of, is to be found in this oath preſerved by Æſchines * *I ſwear that I will never deſtroy a town of the Amphyctions, and that I will not divert the courſe of its running waters; if any nation ſhall preſume to do ſuch a thing, I will declare war againſt them, and will deſtroy their towns.* The laſt article of this law, which ſeems to confirm the firſt, is really contrary to it. Amphyction is willing that the Greek towns ſhould never be deſtroyed, and yet his law paves the way for the deſtruction of theſe towns. In order to eſtabliſh a proper law of nations among the Greeks, they ought to have been accuſtomed early to think it a barbarous thing to deſtroy a Greek town; conſequently they ought not even to deſtroy the deſtroyers. Amphyction's law was juſt; but it was not prudent; this appears even from the abuſe made of it. Did not Philip aſſume the power of deſtroying towns, under the pretence of their having infringed the laws of the Greeks? Amphyction might have inflicted other puniſhments, he might have ordained, for example, that a certain number of the magiſtrates of the deſtroying town or of the chiefs of the infringing army ſhould be puniſhed with death; that the deſtroying nation ſhould ceaſe for a while to enjoy the privileges of the Greeks; that they ſhould pay a fine till the town was rebuilt. The law ought above all things to aim at the reparation of damages.

* *De falſâ legatione.*

CHAP.

CHAP. VI.

That laws which appear the ſame, have not always the ſame effect.

CÆSAR made a law to (a) prohibit people from keeping above ſixty ſeſterces in their houſes. This law was conſidered at Rome as extremely proper for reconciling the debtors to their creditors; becauſe by obliging the rich to lend to the poor, they enabled the latter to pay their debts. A law of the ſame nature made in France, at the time of the ſyſtem (b), proved extremely fatal; becauſe it was enacted under a moſt frightful circumſtance. After depriving people of all poſſible means of laying out their money, they ſtripped them even of the laſt reſource of keeping it at home; which was the ſame as taking it from them by open violence. Cæſar's law was deſigned to make the money circulate; the French miniſter's deſign was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter propoſed in lieu of money nothing but effects which were of no value, and could have none by their very nature, becauſe the law compelled people to accept of them.

Book XXIX. Chap. 6. & 7.

(a) Dio lib. 41.

(b) Mr. Law's ſcheme.

CHAP. VII.

The ſame ſubject continued. Neceſſity of compoſing laws in a proper manner.

THE law of oſtraciſm was eſtabliſhed at Athens, at Argos (b), and at Syracuſe. At Syracuſe it was productive of a thouſand miſchiefs, becauſe it was imprudently enacted. The principal citizens baniſhed one another by holding the leaf of a fig-tree (c) in their hands; ſo that thoſe who had any kind of merit withdrew from public affairs. At Athens, where the legiſlator was ſenſible of the proper extent

(b) Ariſtot. Rep. lib. v. chap. 3.

(c) Plutarchs life of Dionyſius.

BOOK XXIX. Chap. 8.

and limits of his law, oſtraciſm proved an admirable thing: they never condemned more than one perſon at a time; and ſuch a number of ſuffrages were requiſite for paſſing this ſentence, that it was extremely difficult for them to baniſh a perſon, whoſe abſence was not neceſſary to the ſtate.

The power of baniſhing was exerciſed only every fifth year: in fact, as the oſtraciſm was deſigned againſt none but great perſonages who threatened the ſtate with danger, it ought not to be the tranſaction of every day.

CHAP. VIII.

That laws which appear the ſame, were not always made thro' the ſame motive.

IN France they have received moſt of the Roman laws on intails, but thro' quite a different motive from the Romans. Among the latter the inheritance was accompanied with certain * ſacrifices, which were to be performed by the inheritor, and were regulated by the pontifical law; hence it was, that they reckoned it a diſhonor to die without heirs, that they made ſlaves their heirs, and that they deviſed intails. Of this we have a very ſtrong proof in the vulgar intail, which was the firſt invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the eſtate in a family of the ſame name, but to find ſome body that would accept of it.

* When the inheritance was too much incumbered, they eluded the pontifical law by certain ſales, from whence comes the word *ſine ſacris hæreditas*.

CHAP.

CHAP. IX.

That the Greek and Roman laws puniſhed ſuicide, but not thro' the ſame motive.

A Man, ſays Plato (a), who has killed one nearly related to him, that is himſelf, not by an order of the magiſtrate, nor to avoid ignominy, but thro' faint-heartedneſs, ſhall be puniſhed. The Roman law puniſhed this action when it was not committed thro' faint-heartedneſs, thro' wearineſs of life, thro' impatience in pain, but thro' a criminal deſpair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Book XXIX. Chap. 9.

(a) Book 9. of laws.

Plato's law was formed upon the Lacedemonian inſtitutions, where the orders of the magiſtrate were abſolute, where ſhame was the greateſt of miſeries, and faint-heartedneſs the greateſt of crimes. The Romans had no longer thoſe fine ideas; theirs was only a fiſcal law.

During the time of the republic, there was no law at Rome againſt ſuicides: this action is always conſidered by their hiſtorians in a favourable light, and we never meet with any puniſhment inflicted upon thoſe who committed it.

Under the firſt emperors, the great families of Rome were continually deſtroyed by criminal proſecutions. The cuſtom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had * an honorable interment, and their wills were executed; becauſe there was no law againſt ſuicides. But when the emperors became as avaricious as cruel, they deprived thoſe who deſtroyed themſelves, of the means of preſerving their eſtates, by rendering it criminal

* *Eorum qui de ſe ſtatuebant humabantur corpora, manebant teſtamenta, pretium feſtinandi.* Tacit.

Book XXIX. Chap. 10. & 11.

for a perſon to make away with himſelf thro' a criminal remorſe.

What I have been ſaying of the motive of the emperors, is ſo true, that they conſented * that the eſtates of ſuicides ſhould not be confiſcated, when the crime for which they killed themſelves was not puniſhed with confiſcation.

CHAP. X.

That laws which ſeem contrary, proceed ſometimes from the ſame ſpirit.

IN our times we ſummon people in their own houſes; but this was not permitted (b) among the Romans.

(a) Leg. 18. ff. *de in jus vocando.*

A ſummons was a (c) violent action, and a kind of a warrant for ſeizing the † body; hence it was no more allowed to ſummon a perſon in his own houſe, than it is now allowed to arreſt a perſon in his own houſe for debt.

(b) See the law of the 12. tables.

(c) See the law 18. ff. de in jus *vocando.*

Both the Roman (d) and our laws admit of this principle alike, that every man ought to have his own houſe for an aſylum, where he ſhould ſuffer no violence.

CHAP. XI.

How we are to judge of the difference of laws.

IN France, the puniſhment againſt falſe witneſſes is capital; in England it is not. Now, to be able to judge which of theſe two laws is the beſt, we muſt add, that in France the rack is uſed againſt criminals, but not in England; that in France the accuſed is not allowed to produce his witneſſes; and that they very ſeldom admit of what is called juſtifying

* Reſcript of the emperor Pius in the 3d law, §. 1, & 2. *ff. de bonis eorum qui ante ſent. mortem ſibi conſciverunt.*

† *Rapit in jus,* Horace, ſatir. 9. hence they could not ſummon thoſe to whom a particular reſpect was due.

fying facts; in England they allow of witneſſes on both ſides. Theſe three French laws form a cloſe and well connected ſyſtem; and ſo do the three Engliſh laws. The law of England, which does not allow of the racking of criminals, has but very little hopes to draw from the accuſed a confeſſion of his crime; for this reaſon it invites witneſſes from all parts, and does not venture to diſcourage them by the fear of a capital puniſhment. The French law which has one reſource more, is not afraid of intimidating the witneſſes; on the contrary, reaſon requires they ſhould be intimidated; it liſtens only to the witneſſes on one ſide *, which are thoſe produced by the attorney general, and the fate of the accuſed depends intirely on their teſtimony. But in England they admit of witneſſes on both ſides, and the affair is diſcuſſed in ſome meaſure between them; conſequently falſe witneſs is there leſs dangerous, the accuſed having a remedy againſt the falſe witneſs, which he has not in France.—Wherefore, to determine which of thoſe laws are moſt agreeable to reaſon, we muſt not conſider them ſingly, but compare the whole together.

CHAP. XII.

That laws which appear the ſame, are ſometimes really different.

THE Greek and Roman laws inflicted the ſame (a) puniſhment on the receiver as on the thief; the French law does the ſame. The former acted rationally, but the latter does not. Among the Greeks and Romans the thief was condemned to a pecuniary puniſhment, which ought alſo to be inflicted on the receiver: for every man that contributes in

(a) Leg. 1. ff. *de receptatoribus.*

* By the ancient French law, witneſſes were heard on both ſides; hence we find in the inſtitutions of St. Lewis, book 1. chap. 7. that there was only a pecuniary puniſhment againſt falſe witneſſes.

Book XXIX. Chap. 13.

what ſhape ſoever to a damage, is obliged to repair it. But as the puniſhment of theft is capital with us, the receiver cannot be puniſhed like the thief, without carrying things to exceſs. A receiver may act innocently on a thouſand occaſions, the thief is always culpable: one hinders the conviction of a crime, the other commits it: in one the whole is paſſive, the other is active; the thief muſt ſurmount more obſtacles, and his ſoul muſt be more hardened againſt the laws.

(a) Ibid.

The civilians have gone further; they look upon the receiver as more odious (a) than the thief; for were it not for the receiver, the theft, ſay they, could not be long concealed. But this again might be right when there was only a pecuniary puniſhment; the affair in queſtion was a damage done, and the receiver was generally better able to repair it: but when the puniſhment became capital, they ought to have been directed by other principles.

CHAP. XIII.

That we muſt not ſeparate the laws, from the end for which they were made: of the Roman laws on theft.

WHEN a thief was caught in the fact, this was called by the Romans an open theft; when he was not detected till ſome time afterwards, it was a private theft.

The law of the twelve tables ordained, that an open thief ſhould be whipt with rods, and condemn'd to ſlavery, if he had attained the age of puberty, or only whipt if he was not of ripe age; but as for the private thief, he was only condemned to a recompence of double the value of what he had ſtolen.

When the Porcian law aboliſhed the cuſtom of whipping the citizens with rods, and of reducing them to ſlavery, the open thief was condemned to * a recompence

* See what Favorinus ſays in Aulus Gellius, book 20. chap. 1.

a recompence of four-fold, and they ſtill continued to condemn the private thief to a recompence of double. Book XXIX. Chap 13.

It ſeems very odd, that theſe laws ſhould make ſuch a difference in the quality of thoſe two crimes, and in the puniſhments they inflicted. In fact, whether the thief was caught either before or after he had carried the ſtolen goods to the place intended, this was a circumſtance which did not alter the nature of the crime. I do not at all queſtion but the whole theory of the Roman laws in relation to theft, was borrowed from the Lacedemonian inſtitutions. Lycurgus, with a view of rendering the citizens dexterous and cunning, ordained that children ſhould be practiſed in thieving, and that thoſe who were caught in the fact ſhould be ſeverely whipt; this occaſioned among the Greeks, and afterwards among the Romans, a great difference between an open and a private theft *.

Among the Romans a ſlave who had been guilty of ſtealing, was thrown from the Tarpeian rock. Here the Lacedemonian inſtitutions were out of the queſtion; the laws of Lycurgus in relation to theft were not made for ſlaves; to deviate from them in this reſpect was in reality conforming to them.

At Rome, when a perſon of unripe age happened to be caught in the fact, the prætor ordered him to be whipt with rods according to his pleaſure, as was practiſed at Sparta. All this had a remoter origin. The Lacedemonians had derived theſe uſages from the Cretans; and Plato (a), who wants to prove that the Cretan inſtitutions were deſigned for war, cites the following, namely the faculty of bearing pain in private combats, and in puniſhments inflicted for open theft.

(a) Of laws, book 1.

† Compare what Plutarch ſays in the Life of Lycurgus with the laws of the digeſt. title de furtis; and the inſtitutes, book 4. tit. 1. §. 1, 2, & 3,

Book XXIX. Chap. 14.

As the civil laws depend on the political inſtitutions, becauſe they are made for the ſame ſociety; whenever there is a deſign of adopting the civil law of another nation, it would be proper to examine before-hand, whether they have both the ſame inſtitutions, and the ſame political law.

Thus when the Cretan laws on theft were adopted by the Lacedemonians, as their conſtitution and government were adopted at the ſame time, theſe laws were equally reaſonable in both nations. But when they were carried from Lacedemonia to Rome, as they did not find there the ſame conſtitution, they were always thought ſtrange, and had no manner of connection with the other civil laws of the Romans.

CHAP. XIV.

That we muſt not ſeparate the laws, from the circumſtances in which they were made.

IT was decreed by a law at Athens, that when the city was beſieged, all the uſeleſs people ſhould be put to death *. This was an abominable political law, in conſequence of an abominable law of nations. Among the Greeks the inhabitants of a town taken, loſt their civil liberty, and were ſold as ſlaves. The taking of a town implied its intire deſtruction; which is the ſource not only of thoſe obſtinate defences, and of thoſe unnatural actions, but likewiſe of thoſe ſhocking laws which they ſometimes enacted.

The Roman laws† ordained that phyſicians ſhould be puniſhed for neglect or unskilfulneſs. In thoſe caſes if the phyſician was a perſon of any fortune or rank, he was only condemned to *tranſportation*; but if he was of a low condition, he was put to death.

* Inutilis ætas occidatur. *Syrian in Hermog.*

† The Cornelian law *de Sicariis*, Inſtitut. lib. 4. tit. 3. de lege Aquilia, §. 7.

death. By our laws it is otherwiſe. The Roman laws were not made under the ſame circumſtances as ours: at Rome every ignorant pretender intermeddled with phyſic; but amongſt us, phyſicians are obliged to go thro' a regular courſe of ſtudy, and to take their degrees; for which reaſon they are ſuppoſed to underſtand their art.

CHAP. XV.

That ſometimes it is proper the law ſhould amend itſelf.

THE law of the twelve tables * allowed people to kill a night-thief as well as a day-thief, if upon being purſued he attempted to make a defence: but it required that the perſon who killed the thief †, ſhould cry out and call his fellow-citizens; this is what thoſe laws, which permit people to do juſtice to themſelves, ought always to require. 'Tis the cry of innocence, which in the very moment of the action, calls in witneſſes, and appeals to judges. The people ought to take cognizance of the action, and at the very inſtant of its being done; an inſtant when every thing ſpeaks, the air, the countenance, the paſſions, ſilence; and when every word either condemns or abſolves. A law which may become ſo contrary to the ſecurity and liberty of the citizens, ought to be executed in their preſence.

CHAP. XVI.

Things to be obſerved in the compoſing of laws.

THOSE who have a genius ſufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

The

* See the 4th law, ff. ad leg. Aquil.

† Ibidem, ſee the decree of Taſſillon, added to the law of the Bavarians, *de popularib. legib. art.* 4.

Book XXIX. Chap. 16.

The ſtyle ought to be conciſe. The laws of the twelve tables are a model of conciſeneſs; the very children * uſed to learn them by heart. Juſtinian's *Novels* were ſo very diffuſed, that they were obliged to abridge them †.

The ſtyle ſhould alſo be plain and ſimple; a direct expreſſion being always better underſtood than an indirect one. There is no majeſty at all in the laws of the lower empire; princes are made to ſpeak like rhetoricians. When the ſtyle of laws is tumid, they are looked upon only as a work of parade and oſtentation.

'Tis an eſſential article that the words of the laws ſhould excite in every body the ſame ideas. Cardinal Richelieu (a) agreed, that a miniſter might be accuſed before the king; but he would have the accuſer puniſhed, if the facts he proved were not matters of moment. This was enough to hinder people from telling any truth whatſoever againſt the miniſter; becauſe a matter of moment is intirely relative, and what may be of moment to one, is not ſo to another.

(a) Political teſtament.

The law of Honorius puniſhed with death any perſon that purchaſed a freed-man as a ſlave, or that ‖ gave him moleſtation. He ſhould not have made uſe of ſo vague an expreſſion: the moleſtation given to a man depends intirely on the degree of his ſenſibility.

When the law wants to fix a ſet rate upon things, it ſhould avoid as much as poſſible the valuing it in money. The value of money changes from a thouſand cauſes, and the ſame denomination continues without the ſame thing. Every one knows the ſtory of that impudent (b) fellow at Rome, who uſed to give thoſe he met a box on the ear, and

(b) Aulus Gellius, book 20. c. 1.

* Ut carmen neceſſarium, *Cicero* de legib. lib. ii.

† 'Tis the work of *Irnerius*.

‖ *Aut qualibet mani miſſione donatum inquietare voluerit.* Appendix to the Theodoſian code in the firſt volume of father Sirmondus's works, p. 737.

and afterwards tendered them the five and twenty pence of the law of the twelve tables. Book XXIX. Chap. 16.

When a law has once fixed the ideas of things, it ſhould never return to vague expreſſions. In the criminal ordinance of Lewis XIV. * after an exact enumeration of the cauſes in which the king is immediately concerned, adds theſe words, *and thoſe which in all times have been ſubject to the determination of the king's judges*, which renders the thing again arbitrary, after it had been fixed.

Charles VII. † ſays, he has been informed that appeals are made three, four, and ſix months after judgment, contrary to the cuſtom of the kingdom, in a country governed by cuſtom: he therefore ordains that they ſhall appeal forthwith, unleſs there happens to be ſome fraud or deceit in the attorney ‖, or unleſs there be a great or evident cauſe to ſue the appellant. The end of this law deſtroys the beginning, and it deſtroys it ſo effectually, that they uſed afterwards to appeal during the ſpace of thirty years §.

The law of the Lombards (a) does not allow a woman that has taken a religious habit, tho' ſhe has made no vow, to marry; becauſe, ſays this law, *if a ſpouſe who has been contracted to a woman only by a ring, cannot without guilt be married to another; by a much ſtronger reaſon the ſpouſe of God, or of the bleſſed virgin.* . . . . Now I ſay that in laws, the arguments ſhould be drawn from one reality to another, and not from reality to figure, or from figure to reality. (a) Book 2. tit. 37.

A

* We find in the verbal proceſs of this ordinance the motives that determined him.

† In his ordinance of Montel-les-tours in the year 1453.

‖ They might puniſh the attorney without there being any neceſſity of diſturbing the public order.

§ The ordinance of the year 1667, has made ſome regulations upon this head.

BOOK XXIX. Chap. 16.

A law enacted by Conſtantine (a) ordains, that the ſingle teſtimony of a biſhop ſhould be ſufficient without liſtening to any other witneſſes. This prince took a very ſhort method; he judged of affairs by perſons, and of perſons by dignities.

(a) In father Sirmondus's appendix to the Theodoſian code, tom. i.

The laws ought not to be ſubtle; they are deſigned for people of common underſtanding, not as an art of logic, but as the plain reaſon of a father of a family.

When there is no neceſſity for exceptions and limitations in a law, it is much better to omit them: details of that kind throw people into new details.

No alteration ſhould be made in a law without ſufficient reaſon. Juſtinian ordained, that a huſband might be repudiated without the wife's loſing her portion, if for the ſpace of (b) two years he had been incapable of conſummating the marriage. He altered his law afterwards, and allowed the (c) poor wretch three years. But in a caſe of that nature two years are as good as three, and three are not worth more than two.

(b) Leg. I. Cod. de Repudiis.

(c) See the Authentic *Sed hodie*, in the code *de Repudiis*.

When a legiſlator condeſcends to give the reaſon of his law, he ought to give one worthy of it. A Roman (d) law decrees, that a blind man is incapable to plead, becauſe he cannot ſee the ornaments of the magiſtracy. So bad a reaſon muſt have been given on purpoſe, when ſuch a number of good reaſons were at hand.

(d) Leg. i. ff. de portul.

Paul the civilian (e) ſays, that a child grows perfect in the ſeventh month, and that the proportion of Pythagoras's numbers ſeems to prove it. 'Tis very extraordinary that they ſhould judge of thoſe things by the proportion of Pythagoras's numbers.

(e) In his Sentences, book iv. tit. 9.

Some French lawyers have aſſerted, that when the king made an acquiſition of a new country, the churches became ſubject to the *Regale*, becauſe the king's crown is round. I ſhall not examine here into the king's rights, or whether in this caſe the reaſon of the civil or eccleſiaſtic law ought to ſubmit

mit to that of the law of politics: I ſhall only ſay, that thoſe auguſt rights, ought to be defended by grave maxims. Was there ever ſuch a thing known, as the real rights of a dignity, founded on the figure of the ſign of that dignity?

Davila (a) ſays, that Charles IX. was declared of age in the parliament of Roan, at his entrance into his fourteenth year, becauſe the laws require every moment of the time to be reckoned, in caſes relating to the reſtitution and adminiſtration of an orphan's eſtate; whereas it conſiders the year commenced as a year complete, when the caſe is concerning the acquiſition of honors. I am very far from cenſuring a regulation which has been hitherto attended with no inconveniency; I ſhall only take notice that the reaſon alledged (b) is not the true one; it is falſe, that the government of a nation is only an honor.

(a) Della guerra civile di Francia, pag. 96.

(b) The Chancellor de l'Hopital, ibid.

In point of preſumption, that of the law is far preferable to that of the man. The French law (c) conſiders every act of a merchant, during the ten days preceding his bankruptcy as fraudulent: this is the preſumption of the law. The Roman law inflicted puniſhments on the huſband, who kept his wife after ſhe had been guilty of adultery, unleſs he was induced to it through fear of the event of a law-ſuit, or through contempt of his own ſhame; this is the preſumption of the man. The judge muſt have preſumed the motives of the huſband's conduct, and muſt have determined a very obſcure and ambiguous point: when the law preſumes, it gives a fixed rule to the judge.

(c) It was made in the month of November, 1702.

Plato's laws, as I have obſerved already, required that a puniſhment ſhould be inflicted on the perſon that killed himſelf, not with a deſign of avoiding ſhame, but through faint-heartedneſs. This law was defective in this reſpect, that in the only caſe in which it was impoſſible to draw from the criminal an acknowledgment of the motives upon which he had

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had acted, it required the judge to determine concerning theſe motives.

As uſeleſs laws debilitate ſuch as are neceſſary, ſo thoſe that may be eaſily eluded, weaken the legiſlation. Every law ought to have its effect, and no one ſhould be ever ſuffered to deviate from it by a particular convention.

The Falcidian law ordained among the Romans, that the heir ſhould always have the fourth part of the inheritance: another law * ſuffered the teſtator to prohibit the heir from retaining this fourth part. This is making a jeſt of the laws. The Falcidian law became uſeleſs; for if the teſtator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to favour him, he forbad him to make uſe of the Falcidian law.

Care ſhould be taken that the laws be worded in ſuch a manner, as not to be contrary to the very nature of things. In the proſcription of the prince of Orange, Philip II. promiſes to any man that will kill the prince, to give him or his heirs five and twenty thouſand crowns, together with the title of nobility; and this upon the word of a king, and as a ſervant of God. To promiſe nobility for ſuch an action! to ordain ſuch an action in the quality of a ſervant of God! This is equally ſubverſive of the ideas of honor, morality, and religion.

There very ſeldom happens to be a neceſſity of prohibiting a thing which is not bad, under pretence of ſome imaginary perfection.

There ought to be a certain ſimplicity and candor in the laws: made to puniſh the iniquity of men, they themſelves ought to have the moſt ſpotleſs innocence. We find in the law of the (a) Viſigoths that ridiculous requeſt, by which the Jews were obliged to eat every thing dreſſed with pork, provided they did not eat the pork itſelf. This was a very great cruelty; they were obliged to ſubmit to a

(a) Book xii. tit. 2. §. 16.

* 'Tis the Authentic *ſed cum teſtator.*

a law, contrary to their own; and they were allowed to retain nothing more of their own, than what might ſerve as a mark to diſtinguiſh them. Book XXIX. Chap. 17. & 18.

CHAP. XVII.
A bad method of giving laws.

THE Roman emperors manifeſted their will like our princes, by decrees and edicts; but they permitted, which our princes do not do, both the judges and private people to interrogate them by letters, in their ſeveral differences; and their anſwers were called reſcripts. The decretals of the popes are reſcripts, ſtrictly ſpeaking. 'Tis plain, that this is a bad method of legiſlation. Thoſe who thus apply for laws, are bad guides to the legiſlator; the facts are always wrong ſtated. Julius Capitolinus (a) ſays, that Trajan often refuſed to give this kind of reſcripts, leſt a ſingle deciſion and frequently a particular favour, ſhould be extended to all caſes. Macrinus (b) had reſolved to aboliſh all thoſe reſcripts; he could not bear that the anſwers of Commodus, Caracalla, and all thoſe other ignorant princes, ſhould be conſidered as laws. Juſtinian thought otherwiſe, and he filled his compilement with them.

(a) See Julius Capitolinus *in Macrino.*

(b) Ibid.

I would adviſe thoſe who read the Roman laws, to diſtinguiſh carefully between this ſort of hypotheſes, and the Senatus-conſulta, the Plebiſcita, the general conſtitutions of the emperors, and all the laws founded on the nature of things, on the frailty of women, the weakneſs of minors, and the public utility.

CHAP. XVIII.
Of the ideas of uniformity.

THERE are certain ideas of uniformity, which ſometimes ſtrike great geniuſes, (for they even affected

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affected Charlemain) but infallibly make an impreſſion on little ſouls. They diſcover therein a kind of perfection, becauſe it is impoſſible for them not to diſcover it; the ſame weights in the *police*, the ſame meaſures in commerce, the ſame laws in the ſtate, the ſame religion in all its parts. But is this always right, and without exception? Is the evil of changing always leſs than that of ſuffering? And does not a greatneſs of genius conſiſt rather in diſtinguiſhing between thoſe caſes in which uniformity is requiſite, and thoſe in which there is a neceſſity for differences? In China, the Chineſe are governed by the Chineſe ceremonial; and the Tartars by theirs: And yet there is no nation in the world that aims ſo much at tranquillity. If the people obſerve the laws, what ſignifies it whether theſe laws are the ſame?

CHAP. XIX.
Of legiſlators.

ARISTOTLE wanted to ſatisfy, ſometimes his jealouſy againſt Plato, and ſometimes his paſſion for Alexander. Plato was incenſed againſt the tyranny of the people of Athens. Machiavel was full of his idol, the duke of Valentinois. Sir Thomas Moor, who ſpoke rather of what he had read, than of what he thought, wanted (a) to govern all ſtates with the ſimplicity of a Greek city. Harrington was full of the idea of his favourite republic of England, whilſt a croud of writers ſaw nothing but confuſion, where they ſaw no crown. The laws always meet the paſſions and prejudices of the legiſlator; ſometimes they paſs through, and imbibe only a tincture; ſometimes they ſtop, and are incorporated with them.

(a) In his *Utopia*.

BOOK XXX.

Theory of the feudal laws among the Franks, in the relation they bear to the eſtabliſhment of the monarchy.

CHAP. I.

Of feudal laws.

I Should think my work imperfect, were I to paſs over in ſilence an event which happened once, and perhaps will never happen more; were I not to ſpeak of thoſe laws which appeared of a ſudden all over Europe, without having any connexion with thoſe hitherto known; of thoſe laws, which have done infinite good and infinite miſchief; which have left rights, when the domain has been ceded; which by veſting ſeveral perſons with different kinds of ſeignory over the ſame things or perſons, have diminiſhed the weight of the whole ſeignory; which have eſtabliſhed different limits in empires of too great an extent; which have been productive of rule with an inclination to anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itſelf; but conſidering the nature of the preſent undertaking, the reader will here meet rather with a general ſurvey, than with a complete treatiſe of thoſe laws.

The feudal laws form a very beautiful proſpect. A venerable * oak raiſes its lofty head to the ſkies; the eye ſees from afar its ſpreading leaves: upon drawing nearer, it perceives the trunk, but does not diſcern the root: the ground muſt be dug up to diſcover it.

CHAP.

* ——— *Quantum vertice ad auras*
Ætherias, tantum radice ad Tartara tendit. VIRGIL.

CHAP. II.
Of the ſource of feudal laws.

BOOK XXX. Chap. 2. & 3.

THE conquerors of the Roman empire came from Germany. Though few ancient authors have deſcribed their manners, yet we have two of very great weight. Cæſar making war againſt the Germans, deſcribes the manners (a) of that nation; and upon theſe he regulated * ſome of his enterpriſes. A few pages of Cæſar upon this ſubject are equal to whole Volumes.

(a) Book viii.

Tacitus has wrote an intire work on the manners of the Germans. This work is ſhort; but it comes from the pen of Tacitus, who was always conciſe, becauſe he ſaw every thing at one glance.

Theſe two authors agree ſo perfectly with the codes ſtill extant of the laws of the Barbarians, that reading Cæſar and Tacitus we imagine we are reading theſe codes, and in reading the codes we fancy we are reading Cæſar and Tacitus.

But if in the reſearch of the feudal laws, I find myſelf in a dark labyrinth, full of turns and windings, I think I have the clue in my hand, and that I ſhall be able to find my way through.

CHAP. III.
The origin of vaſſalage.

CÆSAR † ſays, "That the Germans neglected "agriculture, that the greateſt part of them "lived upon milk, cheeſe, and fleſh; that no one "had lands or boundaries of their own; that the "princes and magiſtrates of each nation allotted "what portion of land they pleaſed, and where they "pleaſed, to every individual, and obliged them "the

* For inſtance, his retreat from Germany. Ibid.

† Book 6th of the Gallic wars. Tacitus adds, *nulli domus aut ager, aut aliqua cura; prout ad quem venêre aluntur.* De Morib. Germ.

" the year following to remove elſewhere." Taci- Book
tus ſays (a), " That each prince had a multitude of XXX.
" men, who were attached to his ſervice, and fol- Chap. 3.
" lowed him wherever he went." This author gives them a name in his language relative to their ſtate, which is that of *companions* (b). They had a ſtrong emulation to diſtinguiſh themſelves in the prince's eſteem; and the princes had the ſame emulation to diſtinguiſh themſelves in the bravery and number of their companions. " Their dignity and power," continues Tacitus, " conſiſt in being conſtantly " ſurrounded with a multitude of young and choſen " people: this they reckon an ornament in peace, " a defence and ſupport in war. Their name be- " comes famous at home, and among neighbouring " nations, when they excel all others in the number " and courage of their companions: they receive " preſents and embaſſies from all parts. Reputa- " tion frequently decides the fate of war. In battle " it is infamy in the prince to be ſurpaſſed in cou- " rage; it is infamy in the companions not to follow " the brave example of their prince; it is an eter- " nal diſgrace to ſurvive him. To defend him is " their moſt ſacred engagement. If a city is at " peace, the princes go to thoſe who are at war; " and 'tis by force and war they retain a great num- " ber of friends. To theſe they give the war-horſe " and the terrible javelin. Their pay conſiſts in " coarſe but large repaſts. The prince ſupports his " liberality merely by war and plunder. You might " eaſier perſuade them to challenge the enemy and " expoſe themſelves to wounds, than to cultivate " the land, and attend to the cares of huſbandry; " they refuſe to acquire by ſweat what they can " purchaſe with blood."

(a) Demorib. Germ.
(b) Comites.

Thus, among the Germans there were vaſſals, but no fiefs; they had no fiefs, becauſe the princes had no lands to give; or rather their fiefs conſiſted in

Book XXX. Chap. 4.

horſes trained for war, in arms, and feaſting. There were vaſſals, becauſe there were truſty men who were bound by their word, who were engaged to follow the prince to battle, and performed very near the ſame ſervice as was afterwards performed for the fiefs.

CHAP. IV.

The ſame ſubject continued.

(a) De Bello Gallico, lib. vi.

CÆSAR (a) ſays, that "when any of the princes "declared to the aſſembly that he intended to "ſet out upon ſome expedition, and aſked them "to follow him; thoſe who approved the leader, "and the enterprize, ſtood up and offered their "aſſiſtance. Upon which they were commended "by the multitude. But if they did not fulfil their "engagements, they loſt the public eſteem, and "were looked upon as deſerters and traitors."

What Cæſar ſays in this place, and what we have extracted in the preceding chapter from Tacitus, is the foundation of the hiſtory of the firſt race.

We muſt not therefore be ſurpriſed, that our kings ſhould have new armies to raiſe upon every expedition, new troops to perſuade, new people to engage; that to acquire much, they were obliged to ſpend a great deal; that they ſhould inceſſantly acquire by the diviſion of lands and ſpoils, and give theſe lands and ſpoils inceſſantly away; that their domain ſhould continually increaſe and diminiſh; that a father upon giving a kingdom (b) to one of his children, ſhould always accompany it with a treaſure; that the king's treaſure ſhould be conſidered as neceſſary to the monarchy; and that one * king could

(b) See the life of Dagobert.

* See Gregory of Tours, book vi. on the marriage of the daughter of Chilperic. Childebert ſends ambaſſadors to tell him, that he ſhould not give the cities of his father's kingdom to his daughter, nor his treaſures, nor his bondmen, nor horſes, nor horſemen, nor teams of oxen, &c.

could not give part of it to ſtrangers, even as a portion with his daughter, without the conſent of the other kings. The monarchy moved by ſprings, which they were conſtantly obliged to wind up.

CHAP. V.

Of the conqueſt of the Franks.

IT is not true, that the Franks upon entering Gaul, took poſſeſſion of all the country to turn it into fiefs. This has been the opinion of ſome people, becauſe they ſaw almoſt all the country towards the end of the ſecond race converted into fiefs, rear-fiefs, or other dependances; but this was owing to particular cauſes, which we ſhall explain hereafter.

The conſequence which ſome would infer from thence, that the Barbarians made a general regulation for eſtabliſhing in all parts a pure villainage, is not leſs falſe than the principle. If at a time when the fiefs were precarious, all the lands of the kingdom had been fiefs or dependances of fiefs, and all the men in the kingdom vaſſals or ſlaves ſubordinate to vaſſals: as the perſon that has property is always poſſeſſed of power, the king who continually diſpoſed of the fiefs, that is, of the only property then exiſting, would have been poſſeſſed of as arbitrary a power, as that of the Grand Signor, in Turky; which is abſolutely contradictory to all hiſtory.

CHAP. VI.

Of the Goths, Burgundians, *and* Franks.

GAUL was invaded by the German nations. The Viſigoths took poſſeſſion of the province of Narbonne, and of almoſt all the ſouth; the Burgundians ſettled in the eaſt; and the Franks ſubdued very near all the reſt.

No doubt but theſe Barbarians retained in their reſpective conqueſts, the manners, inclinations, and

Book XXX. Chap. 7.

uſages of their own country; for no nation can change in an inſtant their manner of thinking and acting. Theſe people in Germany neglected agriculture. It ſeems by Cæſar and Tacitus, that they applied themſelves greatly to a paſtoral life: hence the regulations of the codes of barbarian laws, are almoſt all relating to their flocks. Roricon, who wrote a hiſtory among the Franks, was a ſhepherd.

CHAP. VII.

Different ways of dividing the lands.

AFTER the Goths and Burgundians had under various pretences penetrated into the heart of the empire, the Romans, in order to put a ſtop to their devaſtations, were obliged to provide for their ſubſiſtence. At firſt they allowed them * corn; but afterwards they choſe to give them lands. The emperors, or the Roman † magiſtrates in their name, made particular conventions with them concerning the diviſion of lands, as we find by the chronicles and in the codes of the Viſigoths (a) and Burgundians ‖.

(a) Book x. tit. 1. §. 8, 9, & 16.

The Franks did not follow the ſame plan. In the Salic and Ripuarian laws we find not the leaſt veſtige of any ſuch diviſion of lands: they had conquered the country, and ſo took what they pleaſed, making no regulations but amongſt themſelves.

Let us therefore diſtinguiſh between the conduct of the Burgundians and Viſigoths in Gaul, of thoſe ſame Viſigoths in Spain, of the (b) auxiliary troops under Auguſtulus and Odoacer in Italy, and that of the Franks in Gaul, and of the Vandals (c) in Africa.

(b) See Procopius *war of the Goths.*

(c) See Procopius *war of the Vandals.*

The

* The Romans obliged themſelves to this by treaties.

† *Burgundiones partem Galliæ occuparunt, terraſque cum Gallicis ſenatoribus diviſerunt.* Marius's Chronicle in the year 456.

‖ Chap. 54. §. 1. & 2. This diviſion was ſtill ſubſiſting in the time of Lewis the Pious, as appears by his capitulary of the year 829. which has been inſerted in the law of the Burgundians, tit. 79. §. 1.

The former entered into conventions with the ancient inhabitants, and in conſequence thereof made a diviſion of lands between them; the latter did no ſuch thing.

CHAP. VIII.

The ſame ſubject continued.

WHAT has induced ſome people to think that the Roman lands were entirely uſurped by the Barbarians, is their finding in the laws of the Viſigoths and the Burgundians, that theſe two nations had two thirds of the lands: but theſe they took, only in certain quarters where they were aſſigned them.

Gundebald * ſays in the law of the Burgundians, that his people at their eſtabliſhment had two thirds of the lands allowed them; and the ſecond ſupplement † to this law takes notice, that only a moiety would be allowed to thoſe who ſhould hereafter come to that country. Therefore all the lands had not been divided in the beginning, between the Romans and the Burgundians.

In the texts of thoſe two regulations we meet with the ſame expreſſions; conſequently they explain one another, and as the ſecond cannot be underſtood to mean an univerſal diviſion of lands, neither can this ſignification be given to the firſt.

The Franks acted with the ſame moderation as the Burgundians; they did not ſtrip the Romans wherever they extended their conqueſts. What would they have done with ſo much land? They took what ſuited them, and left the reſt.

* *Licet eo tempore quo populus noſter mancipiorum tertiam & duas terrarum partes accepit, &c.* Law of the Burgundians, tit. 54. §. 1.

† *Ut non amplius a Burgundionibus, qui infra venerunt requiratur, quam ad præſens neceſſitas fuerit meditas terræ,* art. 11.

CHAP. IX.

A juſt application of the law of the Burgundians *and that of the* Viſigoths, *in relation to the diviſion of lands.*

Book XXX. Chap. 9.

'TIS to be conſidered that thoſe diviſions of land were not made with a tyrannical ſpirit; but with a view of relieving the reciprocal wants of two nations, that were to inhabit the ſame country.

The law of the Burgundians ordains, that a Burgundian ſhall be received in an hoſpitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus (a), were the moſt hoſpitable people in the world.

(a) De moribus Germanorum.

By the law of the Burgundians it is ordained, that the Burgundians ſhall have two thirds of the lands, and one third of the ſlaves. In this it conſidered the genius of the two nations, and conformed to the manner in which they procured their ſubſiſtence. As the Burgundians dealt chiefly in cattle, they wanted a great deal of land and few ſlaves; and the Romans from their application to agriculture, had need of leſs land and of a greater number of ſlaves. The woods were equally divided, becauſe their wants in this reſpect were the ſame.

(b) And in that of the Viſigoths.

We find in the code (b) of the Burgundians, that each Barbarian was placed with a Roman. The diviſion therefore was not general; but the Romans who gave the diviſion, were equal in number to the Burgundians who received it. The Roman was injured as little as poſſible: The Burgundians as a martial people, fond of hunting and of a paſtoral life, did not refuſe to accept of the fallow grounds; while the Romans kept ſuch lands as were propereſt for culture; the Burgundian's flock fattened the Roman's field.

CHAP.

CHAP. X.
Of ſervitudes.

THE law of the Burgundians (a) takes notice, that when thoſe people ſettled in Gaul, they were allowed two thirds of the land, and one third of the ſlaves. Pure villainage was therefore* eſtabliſhed in that part of Gaul, before it was invaded by the Burgundians. Book XXX. Chap. 10. (a) Tit. 54.

The law of the Burgundians in points relating to the two nations, makes a formal †diſtinction in both, between the nobles, the free-born, and the ſlaves. Slavery was not therefore a thing particular to the Romans; nor liberty and nobility particular to the Barbarians.

This very ſame law ſays (b), that if a Burgundian freedman had not given a particular ſum to his maſter, nor received a third ſhare of a Roman, he was always ſuppoſed to belong to his maſter's family. The Roman proprietor was therefore free, ſince he did not belong to another perſon's family; he was free, becauſe his third portion was a mark of liberty. (b) Tit. 57.

We need only open the Salic and Ripuarian laws, to be ſatisfied that the Romans were no more in a ſtate of ſlavery among the Franks, than among the other conquerors of Gaul.

The count de Boulainvilliers is miſtaken in the capital point of his ſyſtem: he has not proved that the Franks made a general regulation, to reduce the Romans into a ſtate of ſlavery.

As this author's work is penned without art, and as he ſpeaks with the ſimplicity, frankneſs and candor

* This is confirmed by the whole title of the code *de Agricolis & Cenſitis, & Colonis.*

† *Si dentem optimati Burgundioni vel Romano nobili excuſſerit.* tit. 26. §. 1. *& ſi mediocribus perſonis ingenuis tam Burgundionibus quam Romanis.* Ibid. §. 2.

Book XXX. Chap. 11.

dor of the ancient nobility from whom he deſcends, every one is capable of judging of the fine things he ſays, and of the errors into which he is fallen. Wherefore I ſhall not undertake to criticiſe him; I ſhall only obſerve, that he had more wit than underſtanding, more underſtanding than knowledge; tho' his knowledge was not contemptible, for he was well acquainted with the moſt valuable part of our hiſtory and laws.

The count de Boulainvilliers, and the Abbe du Bos, have formed two different ſyſtems, one of which ſeems to be a conſpiracy againſt the commons, and the other againſt the nobility. When the ſun gave leave to Phaeton to drive his chariot, he ſaid to him, "If you aſcend too high, you will burn the heavenly manſions; if you deſcend too low, you will reduce the earth to aſhes: Do not drive to the right, you will meet there with the conſtellation of the ſerpent; avoid going too much to the left, you will there fall in with that of the altar; keep in the middle *."

CHAP. XI.

The ſame ſubject continued.

WHAT firſt gave riſe to the notion of a general regulation made at the time of the conqueſt, is our meeting with a prodigious number of ſervitudes in France, towards the beginning of the third race; and as the continual progreſſion of theſe ſervitudes was not attended to, people imagined in an age of obſcurity a general law which was never made.

Towards

* *Nec preme nec ſummum molire per æthera currum,*
Altiùs egreſſus, cæleſtia tecta cremabis;
Inferius, terras: medio tutiſſimus ibis.
Neu te dexterior tortum declinet in anguem,
Neve ſiniſterior preſſam rota ducat ad aram,
Inter utrumque tene. - - - - Ovid. Metam. lib. ii.

Towards the commencement of the first race, we meet with an infinite number of freemen, both among the Franks and the Romans; but the number of slaves increased to that degree, that at the beginning of the third race, all the husbandmen and almost all the inhabitants * of towns were become slaves; and whereas at the first period there were bodies of burghers in the cities, in the other we hardly meet with any thing but a lord and his slaves.

When the Franks, Burgundians, and Goths, made their several invasions, they took gold, silver, moveables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided amongst the army (a). History shews, that after the first settlement, that is, after the first devastations, they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered every thing in time of war, and granted every thing in time of peace. Were it not so, how should we find both in the Salic and Burgundian laws, such a number of regulations absolutely contrary to a general slavery of the people?

(a) See Gregory of Tours, book ii. chap. 27. Aimoin, book i. chap. 12.

But that which was not effected by the conquest, was effected by the same law of nations (b) which subsisted after the conquest. Opposition, revolts, and the taking of towns, were followed with the slavery of the inhabitants. And, not to mention the wars which the different conquering nations made with one another, as there was this particularity among the Franks, that the different divisions of the monarchy gave rise continually to civil wars between brothers or nephews, in which this law of nations was constantly practised; servitudes of course became more general in France than in other countries;

(b) See *the lives of the Saints in the next page.*

* While Gaul was under the dominion of the Romans, they formed particular bodies; these were generally freedmen, or the descendants of freedmen.

Book XXX. Chap. 11

tries; and this is, I believe, one of the cauſes of the difference between our French laws and thoſe of Italy and Spain, in reſpect to the right of lord-ſhips.

The conqueſt was ſoon over; and the law of nations then employed was productive of ſome ſervitudes. The cuſtom of the ſame law of nations, which obtained for many ages, gave a prodigious extent to thoſe ſervitudes.

(a) Gregory of Tours. book iii.

Theodoric (a) imagining that the people of Auvergne were not faithful to him, thus addreſſed the Franks of his diviſion: *Follow me, and I will carry you into a country where you will have gold, ſilver, captives, clothes, and flocks in abundance; and you ſhall remove all the people into your own country.*

(a) Ibid. book vi. chap. 31.

After the peace (b), which was concluded between Gonthram and Chilperic, the troops employed in the ſiege of Bourges having had orders to return, they carried ſuch a large booty away with them, that they hardly left either men or cattle in the country.

I might quote here *authorities without number: and as the bowels of human compaſſion were moved at thoſe miſeries, as ſeveral holy prelates beholding the captives bound two and two, employed the treaſure belonging to the church, and ſold even the ſacred utenſils, to ranſom as many as they could; and as ſeveral holy monks exerted themſelves on that occaſion, it is in the † lives of the ſaints that we meet with the beſt eclairciſſements on this ſubject. And, notwithſtanding what may be objected to the authors of thoſe lives, namely their having been ſometimes a little too credulous, in reſpect to things which God has certainly performed, if they were neceſſary

* See the chronicle of Fredegarius, in the year 600, and his continuator, in the year 741; the annals of Fuld, in the year 639, and the lives of the ſaints in the next quotation.

† See the lives of St. Epiphanius, St. Eptadius, St. Cæſarius, St. Fidolus, St. Porcian, St. Treverius, St. St. Euſichius, and of St. Leger, the miracles of St. Julian, &c.

ceſſary for the execution of his deſigns; yet we draw conſiderable lights from thence, in reſpect to the manners and uſages of thoſe times. Book XXX. Chap. 12.

When we caſt an eye upon the monuments of our hiſtory and laws, the whole ſeems to be a vaſt * and boundleſs ocean: all theſe frigid, dry, inſipid, and crude writings, muſt be devoured in the ſame manner as Saturn is fabled to have devoured the ſtones.

A vaſt quantity of land which had been in the hands of freemen †, was changed into mortmain, when the country was ſtripped of its free inhabitants; thoſe who had a great multitude of ſlaves, either took large territories by force, or had them yielded by agreement, and built villages, as may be ſeen in different charters. On the other hand, the freemen, who cultivated the arts, found themſelves reduced to exerciſe thoſe arts in a ſtate of ſlavery: thus the ſervitudes reſtored to the arts and to agriculture, whatever they had loſt.

It was a cuſtomary thing with the proprietors of lands, to give them to the churches, in order to hold them themſelves by a quit rent, thinking to partake by their ſervitude of the ſanctity of the churches.

CHAP. XII.

That the lands belonging to the diviſion of the Barbarians paid no taxes.

A People remarkable for their ſimplicity and poverty, a free and martial people who lived without any other induſtry than that of tending their flocks, and who had nothing but ruſh cottages to attach them to their (a) lands; ſuch a people, I ſay, muſt have followed their chiefs for the ſake of booty, and not to pay or to raiſe taxes. The art of tax-

(a) See Gregory of Tours, book ii.

* ——————*Deerant quoque littora ponto.* Ovid. lib. 1.

† Even the huſbandmen themſelves were not all ſlaves; ſee the 18th and 23d law in the code *de Agricolis, & Cenſitis, & Colonis*, and the 20th of the ſame title.

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tax-gathering is always invented too late, and when men begin to enjoy the felicity of other arts.

The tranſient (a) tax of a pitcher of wine for every acre, which was one of the exactions of Chilperic and Fredegonda, related only to the Romans.

(a) Ibid. book v.

In fact, it was not the Franks that tore the rolls of thoſe taxes, but the clergy, who in thoſe days were all Romans. The burthen of this tax lay chiefly on the inhabitants * of the towns; now theſe were almoſt all inhabited by Romans.

(b) Book vii.

Gregory of Tours (b) relates, that a certain judge was obliged after the death of Chilperic to take refuge in a church, for having under the reign of that prince ordered taxes to be levied on ſeveral Franks, who in the reign of Childebert were *ingenui*, or free-born: *Multos de Francis, qui tempore Childeberti regis ingenui fuerant, publico tributo ſubegit.* Therefore the Franks who were not ſlaves, paid no taxes.

There is not a grammarian, but would be aſhamed to ſee how the Abbé du Bos (c) has interpreted this paſſage. He obſerves, that in thoſe days the freedmen were called alſo *ingenui*. Upon this ſuppoſition he renders the Latin word *ingenui*, by *freed from taxes*; a phraſe which we indeed may uſe, as *freed from cares*, *freed from puniſhments*; but in the Latin tongue, ſuch expreſſions as *ingenui a tributis*, *libertini a tributis*, *manumiſſi tributorum*, would be quite monſtrous.

(c) Eſtabliſhment of the French monarchy tom. iii. chap. 14. pag. 515.

We find in the law of the Viſigoths ‖, that when a Barbarian had ſeized upon the eſtate of a Roman, the judge obliged him to ſell it, to the end that this eſtate might continue to be tributary; conſequently the Barbarians paid no taxes.

The

* *Quæ conditio univerſis urbibus per Galliam conſtitutis ſummopere eſt adhibita.* Life of St. Aridius.

‖ *Judices atque præpoſiti tertias Romanorum ab illis qui occupatas tenent auferant, & Romanis ſuâ exactione ſine aliquâ dilatione reſtituant, ut nihil fiſco debeat deperire*, lib. x. tit. 1. cap. 14.

The Abbé du Bos (a) who, to ſupport his ſyſtem, would fain have the Viſigoths ſubject to taxes *, quits the literal and ſpiritual ſenſe of the law, and pretends upon no other indeed than an imaginary foundation, that between the eſtabliſhment of the Goths and this law, there had been an augmentation of taxes which related only to the Romans. But none but father Harduin are allowed to exerciſe thus an arbitrary power over facts.

The ſame author makes a wrong uſe of the capitularies, as well as of the hiſtorians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be underſtood only of (b) ſlaves; when he ſpeaks of their military ſervice, he applies to (c) ſlaves what can never relate but to freemen.

(a) Eſtabliſhment of the Franks in Gaul, tom. iii. cha. 14 pag. 510.

CHAP. XIII.

Of taxes paid by the Romans *and* Gauls, *in the monarchy of the* Franks.

I Might here examine whether after the Gauls and Romans were conquered, they continued to pay the taxes to which they were ſubject under the emperors. But, in order to proceed with greater expedition, I ſhall be ſatisfied with obſerving that if they paid them in the beginning, they were ſoon after exempted, and that thoſe taxes were changed into a military ſervice. For I confeſs I cannot conceive how the Franks ſhould have been at firſt ſuch great friends, and afterwards ſuch ſudden and violent enemies, to taxes.

A capitulary § of Lewis the Debonair, explains extremely well the ſituation of the freemen in the monarchy

(b) Eſtabliſhment of the French monarchy tom. iii. chap. 14. pag. 513. where he quotes the 28th article of the edict of Piſtes. See lower down, chap. 17.

(c) Ibid. tom. iii. chap. 4. pag. 298.

* He lays a ſtreſs upon another law of the Viſigoths, book x. tit. 1. art. 11. which proves nothing at all; it ſays only, that he who has received of a lord a piece of land under condition of a rent or ſervice, ought to pay it.

§ In the year 815, chap. 1. which is agreeable to the capitulary of Charles the Bald, in the year 844. art, 1. & 2.

narchy of the Franks. Some troops * of Goths or Iberians, flying the oppreſſion of the Moors, were received in Lewis's dominions. The agreement made with them was, that like other freemen they ſhould follow their count to the army; that upon a march they ſhould mount guard † and patrol under the command alſo of their count; and that they ſhould furniſh horſes and carriages, for baggage, to the king's ‖deputies and to the ambaſſadors, in their way to and from court; and that they ſhould not be compelled to pay any farther acknowledgment, but ſhould be treated as the other freemen.

It cannot be ſaid that theſe were new uſages, introduced towards the commencement of the ſecond race. This muſt be referred at leaſt to the middle or to the end of the firſt. A capitulary of the year § 864, ſays in expreſs terms, that it was the ancient cuſtom for freemen to perform military ſervice, and to furniſh likewiſe the horſes and carriages abovementioned; duties particular to themſelves, and from which thoſe who poſſeſſed the fiefs were exempt, as we ſhall prove hereafter.

This is not all; there was a regulation ** which hardly permitted the impoſing of taxes on thoſe freemen. He who had four manors §§ was always obliged to march againſt the enemy: he who had but

* *Pro Hiſpanis in partibus Aquitaniæ, Septimaniæ, & provinciæ conſiſtentibns.* Ibid.

† *Excubias & explorationes quas Wactas dicunt.* Ibid.

‖ They were not obliged to furniſh any to the count. Ibid. art. 5.

§ *Ut Pagenſes Franci qui caballos habent cum ſuis comitibus in hoſtem pergant.* The counts are forbid to deprive them of their horſes, *ut hoſtem facere & debitos paraveredos ſecundum antiquam conſuetudinem exſolvere poſſint.* Edict of Piſtes in Baluzius, p. 186.

** Capitulary of Charlemain, in the year 812. chap. 1. Edict of Piſtes in the year 864. art. 27.

§§ *Quatuor manſos.* I fancy that what they called *Manſus* was a particular portion of land belonging to a farm where there were ſlaves; witneſs the capitulary of the year 853, *apud Sylvacum*, tit. xiv. againſt thoſe who drove the ſlaves from their *Manſus*.

but three, was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and ſtaid at home. In like manner, they joined two freemen who had each two manors; he that went to the army had half his charges bore by him who ſtaid at home.

Again, we have an infinite number of charters, in which the privileges of fiefs are granted to lands or diſtricts poſſeſſed by freemen, and of which I ſhall make further mention hereafter. Theſe lands are exempted from all the duties or ſervices, which were required of them by the counts, and by the reſt of the king's officers: and as all theſe ſervices are particularly enumerated, without making any mention of taxes, 'tis manifeſt that no taxes were impoſed upon them.

It was very natural that the Roman art of tax-gathering, ſhould fall of itſelf in the monarchy of the Franks: it was a moſt complicated art, far above the conception, and wide from the plan, of thoſe ſimple people. Were the Tartars to over-run Europe, we ſhould find it very difficult to make them comprehend what is meant by one of our financers.

The (a) anonymous author of the life of *Lewis the Debonair*, ſpeaking of the counts and other officers of the nation of the Franks, whom Charlemain eſtabliſhed in Aquitain, ſays, that he intruſted them with the care of defending the frontiers, as alſo with the military power and the intendancy of the domains belonging to the crown. This ſhews the ſtate of the royal revenues under the ſecond race. The prince had kept his domains in his own hands, and employed his ſlaves in improving them. But the indictions, the capitations, and other impoſts, raiſed at the time of the emperors on the perſons or goods of freemen, had been changed into an obligation of defending the frontiers, and marching againſt the enemy.

(a) In Pithou, part ii. pag. 157.

The biſhops writing (a) to Lewis, brother to Charles the Bald, uſed theſe words: "*Take care of your lands, that you may not be obliged to travel continually by the houſes of the clergy, and to tire their ſlaves with carriages. Manage your affairs,* continue they, *in ſuch a manner, that you may have enough to live upon, and to receive embaſſies.*" It is evident, that the king's revenues * in thoſe days conſiſted of their domains.

(a) See the capitulary of the year 858. art. 14.

CHAP. XIV.

Of what they called Cenſus.

AFter the Barbarians had quitted their country, they were deſirous of reducing their uſages to writing; but as they found a difficulty in writing German words with Roman letters, they publiſhed theſe laws in Latin.

In the confuſion and rapidity of the conqueſt, moſt things changed their nature: in order however to expreſs them, they were obliged to make uſe of ſuch old Latin words, as were moſt analogous to the new uſages. Thus whatever was likely to revive † the idea of the ancient cenſus of the Romans, they called by the name of *cenſus, tributum*; and when things had no relation at all to the Roman cenſus, they expreſſed, as well as they could, the German words with Roman letters: thus they formed the word *fredum*, on which I ſhall have occaſion to deſcant in the following chapters.

The

* They levied alſo ſome duties on rivers, where there happened to be a bridge or a paſſage.

† The *cenſus* was ſo generical a word, that they made uſe of it to expreſs the tolls of rivers, when there was a bridge or ferry to paſs. See the third capitulary, in the year 803. edition of Baluzius, pag. 395. art. 1. & the 5th in the year 819 pag. 616. They gave likewiſe this name to the carriages furniſhed by the freemen to the king, or to his deputies, as appears by the capitulary of Charles the Bald, in the year 865. art. 8.

The words *cenſus* and *tributum* having been thus employed in an arbitrary manner, this has thrown ſome obſcurity on the ſignification in which theſe words were uſed under the firſt and ſecond race. And modern * authors who had adopted particular ſyſtems, having found theſe words in the writings of thoſe days, they imagined that what was then called cenſus, was exactly the cenſus of the Romans; and from thence they inferred this conſequence, that our kings of the two firſt races, had put themſelves in the place of the Roman emperors, and made no change in † their adminiſtration. Beſides, as particular duties raiſed under the ſecond race, were by chance and by certain ‖ reſtrictions converted into others, they inferred from thence, that theſe duties were the cenſus of the Romans: and as ſince the modern regulations, they found that the crown domains were abſolutely unalienable, they pretended that thoſe duties which repreſented the Roman cenſus, and did not form a part of the domains, were merely uſurpations. I omit the other conſequences.

To apply the ideas of the preſent time to diſtant ages, is a moſt fruitful ſource of error. To thoſe people who want to modernize all the ancient ages, I ſhall ſay what the Egyptian prieſts ſaid to Solon, "*O Athenians, you are mere children!*"

CHAP. XV.

That what they called cenſus *was raiſed only on the ſlaves, and not on the freemen.*

THE king, the clergy, and the lords raiſed regular taxes, each on the ſlaves of their reſpective

* The Abbe du Bos, and his followers.

† See the weakneſs of the arguments produced by the Abbe du Bos, in the eſtabliſhment of the French monarchy, tom. iii. book 6. chap. 14. eſpecially the inference he draws from a paſſage of Gregory of Tours, concerning a diſpute between his church and king Charibert.

‖ For inſtance, by infranchiſements.

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tive domains. I prove it with reſpect to the king, by the capitulary *de Villis*; with regard to the clergy, by the codes of the * laws of the Barbarians; with relation to the lords, by the regulations (a) which Charlemain made concerning this ſubject.

(a) Book 5th of the Capitularies, chap. 303.

Theſe taxes were called *cenſus*; they were œconomical and not fiſcal duties, mere private ſervices and not public obligations.

I affirm, that what they called *cenſus* at that time, was a tax raiſed upon the ſlaves. This I prove by a formulary of Marculfus containing a permiſſion from the king to enter into holy orders, provided the perſon be † free-born, and not enrolled in the regiſter of the *cenſus*. I prove it alſo by a commiſſion from Charlemain to a count (b), whom he had ſent into Saxony; which contains the infranchiſement of the Saxons for having embraced Chriſtianity, and is properly a charter of freedom ‖. This prince reſtores them to their former § civil liberty, and exempts them from paying the cenſus. It was therefore the ſame thing to be a ſlave, as to pay the cenſus; to be free, as not to pay it.

(b) In the year 789. edition of the Capitularies by Baluzius, vol. i. pag. 250.

By a kind of letters patent ** of the ſame prince in favour of the Spaniards, who had been received into the monarchy, the counts are forbid to demand any cenſus of them, or to deprive them of their lands. That ſtrangers upon their coming to France were treated as ſlaves, is a thing well known; and Charlemain being deſirous they ſhould be conſidered as

* Law of the Alemans, chap. 22. and the law of the Bavarians, tit. i. chap. 14. where the regulations are to be found which the clergy made concerning their order.

† *Si ille de capite ſuo bene ingenuus ſit, et in Puletico publico cenſitus non eſt*, lib. i. formul. 19.

‖ *Et ut iſta ingenuitatis pagina firma ſtabiliſque conſiſtat*, Ibid.

§ *Priſtinæque libertati donatos & omni nobis debito cenſu ſolutos*, Ibid.

** *Præceptum pro Hiſpanis*, in the year 812, edition of Baluzius, tom. i. pag. 500.

as freemen, since he would have them be proprietors of their lands, he forbad the demanding any census of them.

A capitulary of Charles the Bald (a), given in favor of those very Spaniards, orders them to be treated like the other Franks, and forbids the requiring any census of them: consequently this census was not paid by freemen.

(a) In the year 844. edition of Baluzius, tom. ii. art. 1. & 2. pag. 17.

The thirtieth article of the edict of Pistes reforms the abuse, by which several of the husbandmen belonging to the king or to the church, fold the lands dependent on their manors, to ecclesiastics or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and it ordains, that things should be restored to their primitive situation: the census was therefore a tax peculiar to slaves.

From thence also it follows, that there was no general census in the monarchy; and this is clear from a great number of passages. For what could be the meaning of this * capitulary? *We ordain that the royal census shall be levied in all places, where formerly it was † lawfully levied.* What could be the meaning of that, in which (b) Charlemain orders his commissaries in the provinces, to make an exact enquiry into all the census's that belonged in former times ‖ to the king's domain? And of that (c), in which he disposes of the census's paid by those § of whom they are demanded? What can that other capitulary (d) mean, in which we read, *If any person* ** *has*

(b) In the year 812. art. 10. & 11. edition of Baluzius, tom. i. pag. 498.

(c) In the year 813. art. 6. edition of Baluzius, tom. i. pag. 508.

(d) Book iv. of the Capitularies, art. 37. and inserted in the law of the Lombards.

* Third capitulary of the year 805. art. 20. & 23. inserted in the collection of Anzegise, book iii. art. 15. This is agreeable to that of Charles the Bald, in the year 854. *apud Attiniacum*, art. 6.

† *Undecunque legitime exigebatur.* Ibid.

‖ *Undecunque antiquitus ad partem regis venire solebant.*

§ *De illis unde censa exigunt.*

** *Si quis terram tributariam, unde census ad partem nostram exire solebat, susceperit.*

BOOK XXX. Chap. 15.

has acquired a tributary land, on which we were accuſtomed to levy the cenſus? And that other, in fine (a), in which Charles the Bald * makes mention of the cenſual lands, whoſe cenſus had from time immemorial belonged to the king.

(a) In the year 805. art. 8.

Obſerve that there are ſome paſſages which ſeem at firſt ſight to be contrary to what I have ſaid, and yet confirm it. We have already ſeen that the freemen in the monarchy, were obliged only to furniſh particular carriages; the capitulary juſt now cited gives to this † the name of cenſus, and oppoſes it to the cenſus paid by the ſlaves.

Beſides, the edict (b) of Piſtes takes notice of thoſe Franks, who were obliged to pay the royal cenſus for their ‖ head and for their cottages, and who had ſold themſelves during the famine. The king orders them to be ranſomed. This is § becauſe thoſe who were manumitted by the king's letters, did not, generally ſpeaking, acquire a full and perfect ** liberty, but they paid *cenſum in capite*; and theſe are the people here meant.

(b) In the year 864. art. 34. edition of Baluzius, p. 192.

We muſt therefore explode the idea of a general and univerſal cenſus, derived from the Roman policy, from which the rights of the lords are alſo ſuppoſed to have been derived by uſurpations. What was called *cenſus* in the French monarchy, independently of the abuſe made of that word, was a particular tax impoſed on ſlaves by their maſters.

I beg

* *Unde cenſus ad partem Regis exivit antiquitus.*

† *Cenſibus vel paraveredis quos Franci homines ad regiam poteſtatem exſolvere debeant.*

‖ *De illis Francis hominibus qui cenſum regium de ſuo capite & de ſuis rec llis debeant.*

§ The 28th article of the ſame edict explains this extremely well; it even makes a diſtinction between a Roman freedman, and a Frank freedman: And we likewiſe ſee there that the cenſus was not general; it deſerves to be read.

** As appears by a capitulary of Charlemain in the year 813. which we have already quoted.

I beg the reader to excuſe the exceſſive tediouſneſs of ſuch a number of citations. I ſhould be more conciſe, did I not meet with the Abbe du Bos's book on the eſtabliſhment of the French monarchy in Gaul, continually in my way. Nothing is a greater obſtacle to our progreſs in knowledge, than a bad performance of a celebrated author; becauſe, before we inſtruct, we muſt begin with undeceiving.

CHAP. XVI.

Of the feudal lords or vaſſals.

I Have taken notice of thoſe volunteers among the Germans, who followed their princes in their ſeveral expeditions. The ſame uſage continued after the conqueſt. Tacitus mentions them by the name of companions (a); the Salic law by that of men who have vowed fealty * to the king; the formularies of (b) Marculfus by that of the king's *antruſtions* †, the earlieſt French hiſtorians by that of *Leudes* ‖, faithful and loyal; and thoſe of later date by that of vaſſals § and lords.

(a) *Comites.*

(b) Book i. formal. 8.

In the Salic and Ripuarian laws, we meet with an infinite number of regulations in regard to the Franks, and only with a few for the Antruſtions. The regulations concerning the Antruſtions, are different from thoſe which were made for the other Franks; they are full of what relates to the ſettling of the property of the Franks, but mention not a word concerning that of the Antruſtions. This is becauſe the property of the latter was regulated rather by the political than by the civil law, and was the ſhare that fell to an army, and not the patrimony of a family.

* *Qui ſunt in truſte regis*, tit. 44. art. 4.

† From the word *trew*, which ſignifies faithful, among th Germans.

‖ *Leudes, fideles.*

§ *Vaſſalli, ſeniores.*

Book XXX. Chap. 16.

The goods reſerved for the feudal lords were called fiſcal *‖ goods, benefices, honors, and fiefs, by different authors and in different times.

There is no doubt but the fiefs at firſt were at will (a). We find in Gregory of Tours (b), that Sunegiſilus and Gallomanus were deprived of all they held of the fiſc, and no more left than what was their real property. When Gontram raiſed his nephew Childebert to the throne, he had a private conference with him, in which he named * the perſons who ought to be honored with, and thoſe who ought to be deprived of, the fiefs. In a formulary † of Marculfus, the king gives in exchange not only the benefices held by his fiſc, but likewiſe thoſe which had been held by another. The law of the Lombards, oppoſes (c) the benefices to property. In this our hiſtorians, the formularies, the codes of the different barbarous nations, and all the monuments extant of thoſe days, are unanimous. In fine, the writers of the book of fiefs ‖ inform us, that at firſt the lords could take them back when they pleaſed, that afterwards they granted them for the ſpace of a year §, and that at length they gave them for life.

(a) See the 1ſt book. tit. 1. of the fiefs and *Cujas* on that book.

(b) Book 9th chap. 38.

(c) Liv. iii. tit. 8. §. 3.

CHAP.

*‖ *Fiſcalia.* See the 24th formulary of Marculfus, book i. It is mentioned in the life of S. Maur, *dedit fiſcum unum:* and in the annals of Metz, in the year 747, *dedit illi comitatus & fiſcos plurimos.* The goods deſigned for the ſupport of the royal family were called *regalia.*

* *Quos honoraret muneribus, quos ab honore depelleret.* Ibid. lib. vii.

† *Vel reliquis quibuſcumque beneficiis, quodcumque ille vel fiſcus noſter in ipſis locis tenuiſſe noſcitur.* Lib. i. formul. 30.

‖ *Antiquiſſimo enim tempore ſic erat in Dominorum poteſtate connexum, ut quando vellent poſſent auferre rem in feudum a ſe datam: poſtea verò conventum eſt, ut per annum tantum firmitatem haberent, deinde ſtatutum eſt, ut uſque ad vitam fidelis produceretur.* Feudorum, lib. i. tit. 1.

§ It was a kind of a precarious tenure which the lord conſented or refuſed to renew every year; as Cujas has obſerved.

CHAP. XVII.

Of the military ſervice of freemen.

TWO ſorts of people were bound to military ſervice, the great and leſſer vaſſals who were obliged in conſequence of their fief; and the freemen whether Franks, Romans, or Gauls, who ſerved under the count, and were commanded by him and his officers. BOOK XXX. Chap. 17.

The name of freemen was given to thoſe, who on the one hand had no benefices or fiefs, and on the other were not ſubject to the baſe ſervices of villainage; the lands they poſſeſſed were what they called allodial eſtates.

The counts (a) aſſembled the freemen, and led them againſt the enemy; under them they had officers, who were called * vicars; and as all the freemen were divided into hundreds, which formed what was called a borough, the counts had alſo officers under them who were called *centenarii*, and carried the freemen † of the borough, or their hundreds to the field.

(a) See the capitulary of Charlemain in the year 812. art. 3. & 4. edition of Baluzius, tom. i. p. 491. and the edict of Piſtes in the year 864. art. 26. tom. ii. p. 186.

This diviſion into hundreds is poſterior to the eſtabliſhment of the Franks in Gaul. It was made by Clotharius and Childebert, with a view of obliging each diſtrict to anſwer for the robberies committed in their diviſion; this we find in the decrees‖ of thoſe princes. A regulation of this kind is to this very day obſerved in England.

As the counts carried the freemen againſt the enemy, the feudal lords carried alſo their vaſſals or rear-vaſſals; and the biſhops, abbots, or their § advocates carried likewiſe theirs (b).

(b) Capitulary of Charlemain. in the year 812. art. 1. & 5. edition of Baluzius, tom. i. pag. 490.

The

*Et habeat unuſquiſque comes Vicarios & Centenarios ſecum. book ii. of the capitularies, art. 28.

† They were called *Compagenſes*.

‖ Publiſhed in the year 595. art. 1. See the capitularies, edition of Baluzius, pag. 20. Theſe regulations were undoubtedly made by agreement.

§ *Advocati*.

Book XXX. Chap. 17.

The biſhops were greatly embarraſſed; they were not (a) quite conſiſtent with themſelves; they requeſted of Charlemain not to oblige them any longer to a military ſervice; and when he had granted their requeſt, they complained that he had deprived them of the public eſteem; and this prince was obliged to juſtify his intentions upon this head. Be that as it will, when they were exempted from marching againſt the enemy, I do not find that their vaſſals were led by the counts; on the contrary we ſee (b) that the kings or the biſhops, choſe one of their feudataries to conduct them.

(a) See the capitulary of the year 803. publiſhed at Worms, edition of Baluzius, pag. 408. & 410.

In a capitulary (c) of Lewis the Pious, this prince diſtinguiſhes three ſorts of vaſſals, thoſe belonging to the king, thoſe to the biſhops, and thoſe to the counts. The vaſſals * of a feudal lord were not led againſt the enemy by the count, except ſome employment in the king's houſhold hindered the lord himſelf from leading them.

(b) Capitulary of Worms in the year 803. edition of Baluzius, pag. 409. and the council in the year 845, under Charles the Bald, in verno palatio, edition of Baluzius, tom. ii. pag. 17. art. 8.

But who is it that led the feudal lords into the field? No doubt the king himſelf, who was always at the head of his faithful vaſſals. Hence we conſtantly find in the capitularies a diſtinction made ‖ between the king's vaſſals and thoſe of the biſhops. Such brave and magnanimous princes as our kings, did not take the field to put themſelves at the head of an eccleſiaſtic militia; theſe were not the people they choſe to conquer or die with.

But theſe lords carried their vaſſals and rear-vaſſals with them; as we can prove by the capitulary

(c) The 5th Capitulary, of the year 819. art. 27. edition of Baluzius, pag. 618.

* *De Vaſſis Dominicis, qui adhuc intra caſam ſerviunt, & tamen beneficia habere noſcuntur, ſtatutum eſt, ut quicunque ex eis cum Domino Imperatore domi remanſerint, vaſſallos ſuos caſatos ſecum non retineant; ſed cum comite cujus pagenſes ſunt ire permittant,* 2d capitulary in the year 812. art. 7. edition of Baluzius, tom. i. pag. 494.

‖ 1 Capitul. of the the year 812. art. 5. *de hominibus noſtris, & epiſcoporum & abbatum, qui vel beneficia, vel talia propria habent, &c.* edition of Baluzius, tom. i. pag. 490.

lary *, in which Charlemain ordains, that every freeman, who has four manors either in his own property, or as a benefice from ſomebody elſe, ſhould march againſt the enemy or follow his lord. 'Tis evident that Charlemain means, that the perſon who had a manor of his own, ſhould march under the count, and he who held a benefice of a lord, ſhould ſet out along with him.

And yet the Abbe du Bos (a) pretends, that when mention is made in the capitularies, of tenants who depended only on a particular lord, no others are meant than ſlaves; and he grounds his opinion on the law of the Viſigoths, and the practice of that nation. It is much better to rely on the capitularies themſelves; that which I have juſt quoted, ſays expreſsly the contrary. The treaty between Charles the bald and his brothers, takes notice alſo of freemen, who might chuſe to follow either a lord or the king; and this regulation is conformable to a great many others.

(a) Tom. iii. book 6. chap. 4. p. 299. eſtabliſhment of the French monarchy.

We may therefore conclude, that there were three ſorts of military ſervices; that of the king's vaſſals, who had other vaſſals under them; that of the biſhops or of the other clergy, and their vaſſals; and, in fine, that of the count who commanded the freemen.

Not but the vaſſals might be alſo ſubject to the count; as thoſe who have a particular command are ſubordinate to him, who is inveſted with a more general authority.

We even find that the count and the king's commiſſaries might oblige them to pay the fine, when they had not fulfilled the engagements of their fief.

In

* In the year 812. chap. 1. edition of Baluzius, pag. 490. *ut omnis homo liber, qui quatuor manſos veſtitos de proprio ſuo ſive de alicujus beneficio habet, ipſe ſe præparet & ipſe in hoſtem pergat, ſive cum ſeniore ſuo.*

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In like manner, if the king's vaſſals (a) committed any outrage, they were ſubject to the correction of the count, unleſs they choſe to ſubmit rather to that of the king.

(a) Capitulary of the year 882. art. 11. *apud vernum palatium*, edition of Baluzius, tom. ii. pag. 289.

CHAP. XVIII.

Of the double ſervice.

IT was a fundamental principle of the monarchy, that whoſoever was ſubject to the military power of another perſon, was ſubject alſo to his civil juriſdiction. Thus the capitulary (b) of Lewis the Debonair, in the year 815, makes the military power of the count, and his civil juriſdiction over the freemen, keep always an equal pace. Thus the *placita* * of the count who carried the freemen againſt the enemy, were (c) called the placita of the freemen; from whence undoubtedly came this maxim, that the queſtions in relation to liberty could be decided only in the count's placita, and not in thoſe of his officers. Thus the count never led the vaſſals (d) belonging to the biſhops or to the abbots againſt the enemy, becauſe they were not ſubject to the civil juriſdiction. Thus he never commanded the rear-vaſſals belonging to the king's vaſſals. Thus the gloſſary † of the Engliſh laws informs us, that thoſe to whom ‖ the Saxons gave the name of *Coples*, were by the Normans called *counts*, or *companions*, becauſe they ſhared the judiciary fines with the king. Thus we ſee, that at all times the duty of a vaſſal § towards his lord, was to bear arms ** and to try his peers in his court.

(b) Art. 1. 2. and the council in *verno palatio* of the year 845. art. 8. edition of Baluzius, tom. ii. pag. 17.

(c) Capitularies, book 4th. of the collection of Anzegiſes, art. 57. and the 5th capitulary of Lewis the Pious in the year 819. art. 14. edition of Baluzius, tom. i. pag. 615.

(d) See the 8th note of the preceding chapter.

One

* Or aſſiſes.

† It is to be found in the collection of William Lambard, *de priſcis Anglorum legibus*.

‖ In the word *Satrapia*.

§ This is well explained by the aſſiſes of Jeruſalem, chap. 221. & 222.

** The advowees of the church (*advocati*) were equally at the head of their placita, and of their militia.

One of the reaſons which produced this connexion between the judiciary right and that of leading the forces againſt the enemy, was becauſe the perſon who led them, exacted at the ſame time the payment of the fiſcal duties, which conſiſted in ſome carriage ſervices due by the freemen, and in general in certain judiciary profits, of which we ſhall treat hereafter.

The lords had the right of adminiſtering juſtice in their fief, by the ſame principle as the counts had it in their counties. And indeed the counties in the ſeveral variations that happened at different times, always followed the variations of the fiefs; both were governed on the ſame plan, and by the ſame principles. In a word, the counts in their counties were lords, the lords in their ſeignories were counts.

Thoſe have been miſtaken who conſidered the counts as civil officers, and the dukes as military commanders. Both were equally civil * and military officers: The whole difference conſiſted in the duke's having ſeveral counts under him, though there were counts who had no duke over them, as we learn from Fredegarius (a).

(a) Chronicle, chap. 78. in the year 636.

It will be imagined perhaps that the government of the Franks muſt have been very ſevere at that time, ſince the ſame officers were inveſted with a military and civil power, nay, even with a fiſcal power, over the ſubjects; which in the preceding books, I have obſerved to be diſtinguiſhing marks of deſpotic authority.

But it is not to be believed that the counts pronounced their judgments alone, and adminiſtered juſtice in the ſame manner as the baſhaws do in Turky; in order to judge affairs, they aſſembled a kind of aſſiſes, where the principal men appeared.

In

* See the 8th formulary of Marculfus, book i. which contains the letters given to a duke, patrician, or count; and inveſts them with the civil juriſdiction, as well as with the fiſcal adminiſtration.

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In order to underſtand thoroughly what relates to the judicial proceedings, in the formulas, in the laws of the barbarians, and in the capitularies, 'tis proper to obſerve that the functions of the count, of the *Grafio* or fiſcal judge, and the *Centenarius*, were the ſame; that the judges, the *Rathimburghers*, and the ſheriffs, were the ſame perſons under different names. Theſe were the count's aſſiſtants, and were generally ſeven in number; and as he was obliged to have twelve perſons to judge *, he filled up the number with the principal men †.

But whoever had the juriſdiction, the king, the count, the *Grafio*, the *Centenarius*, the lords, or the clergy, they never judged alone; and this uſage which derived its origin from the foreſts of Germany, was ſtill continued even after the fiefs had aſſumed a new form.

With regard to the fiſcal power, its nature was ſuch, that the count could hardly abuſe it. The rights of the prince in reſpect to the freemen, were ſo ſimple, that they conſiſted only, as we have already obſerved, in certain carriages which were ‖ demanded of them on ſome public occaſions. And as for the judiciary rights, there were laws which prevented (a) miſdemeanors.

(a) See the law of the Ripuarians, tit. 89. and the law of the Lombards, book ii. tit. 52. §. 9.

CHAP. XIX.

Of compoſitions among the barbarous nations.

SINCE it is impoſſible to have any tolerable notion of our political law, unleſs we are thoroughly acquainted with the laws and manners of the German nations, I ſhall therefore ſtop here a while, in order to inquire into thoſe manners and laws.

It

* See concerning this ſubject the capitularies of Lewis the Debonair, added to the Salic law, art. ii. and the formula of judgments given by Du Cange in the word *boni homines*.

† *Per bonos homines*, ſometimes there were none but principal men. See the appendix to the formularies of Marculfus, chap. 51.

‖ And ſome tolls on rivers, of which I have ſpoke already.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards: these were the only public crimes among those people. When a man * had injured another, the relations of the person injured took share in the quarrel, and the offence was cancelled by a satisfaction. This satisfaction was made to the person offended when capable of receiving it; or to the relations if they had been injured in common, or if by the decease of the party injured, the satisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

The law † of the Frisians is the only one I find that has left the people in this situation, in which every family at variance was in some measure in a state of nature, and in which being unrestrained either by a political or civil law, they might give loose to their revenge, till they had obtained satisfaction. Even this law was moderated; a regulation was made (a), that the person whose life was sought after, should be unmolested in his own house, as also in going and coming from church, and from the court where judgments were given.

(a) Additio sapientum, tit. i. §. 1.

The compilers of the Salic laws cite (b) an ancient usage of the Franks, by which a person who had dug a corpse out of the ground in order to strip it, should be banished from society, till the relations had consented to his being readmitted. And as before that time a prohibition was made to every one, even to his own wife, not to give him a morcel of bread or to receive him under their roof; such a man was in

(b) Salic law, tit. lviii. §. 1. tit. xvii. §. 3.

* *Suscipere tam inimicitias seu patris seu propinqui quàm amicitias necesse est: nec implacabiles durant; luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus.* Tacit. de morib. Germ.

† See this law in the 2d title on murders; and Vulemar's addition on robberies.

Book XXX. Chap. 19.

in reſpect to others, and others in reſpect to him, in a ſtate of nature, till an end was put to this ſtate by a compoſition.

This excepted, we find that the ſages of the different barbarous nations thought of determining by themſelves, what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the compoſition which the party injured was to receive. All thoſe barbarian laws are in this reſpect moſt admirably exact: the ſeveral caſes are minutely * diſtinguiſhed, the circumſtances are weighed, the law ſubſtitutes itſelf in the place of the perſon injured, and inſiſts upon the ſame ſatisfaction as he himſelf would have demanded in cold blood.

By the eſtabliſhing of thoſe laws, the German nations quitted that ſtate of nature, in which they ſeem to have lived in Tacitus's time.

Rotharis declares in the law of (a) the Lombards, that he had increaſed the compoſitions anciently accuſtomed for wounds, to the end that the wounded perſon being fully ſatisfied, all enmities ſhould ceaſe. In fact, as the Lombards, from a very poor people, were grown rich by the conqueſt of Italy, the ancient compoſitions were become frivolous, and reconcilements were prevented. I do not queſtion but this was the motive which obliged the other chiefs of the conquering nations to make the different codes of laws now extant.

(a) Book i. tit. 7. §. 15.

The principal compoſition was that which the murderer paid to the relations of the deceaſed. The difference of (b) ſtations produced a difference in the compoſitions: Thus in the law of the Angli, there was a compoſition of ſix hundred ſous for the murder of an *adeling*, two hundred for that of a freeman, and thirty for killing a ſlave. The greatneſs therefore

(b) See the law of the Angli. tit. i. §. 1. 2. & 4. ibid. tit. v. §. 6. the law of the Bavarians, tit. i. chap. 8. & 9. and the law of the Friſians, tit. vv.

* The Salic laws are admirable in this reſpect; ſee eſpecially the titles, 2, 3, 4, 5, 6, and 7, which related to the ſtealing of cattle.

therefore of the compoſition fixed on the life of a man, was one of his principal prerogatives; for beſide the diſtinction it made of his perſon, it likewiſe eſtabliſhed a greater ſecurity in his favour, among rude and violent nations.

This we are made ſenſible of by the law of the (a) Bavarians: it gives the names of the Bavarian families who received a double compoſition, becauſe they were the firſt * after the Agilolfings. The Agilolfings were of the ducal race, and it was cuſtomary with that nation to chuſe a duke out of that family; theſe had a quadruple compoſition. The compoſition for the duke exceeded by a third, that which had been eſtabliſhed for the Agilolfings: *becauſe he is a duke*, ſays the law, *a greater honor is paid to him than to his relations.*

(a) Tit. ii. chap. 20.

All theſe compoſitions were valued in money. But as thoſe people, eſpecially when they lived in Germany, had very little ſpecie, they might pay it in cattle, corn, moveables, arms, dogs, hawks †, lands, *&c.* Very often the law itſelf ‖ determined the value of thoſe things; which explains how it was poſſible for them to have ſuch a number of pecuniary puniſhments with ſo very little money.

Theſe laws were therefore employed in determining exactly the difference of wrongs, injuries, and crimes; to the end that every one might know preciſely how far he had been injured or offended, the reparation he was to receive, and eſpecially that he was to receive no more.

In

* Hozidra, Ozza, Sagana, Habilingua, Anniena. Ibid.

† Thus the law of Ina valued life by a certain ſum of money or by a certain portion of land. *Leges Inæ regis, titulo de villico regio, de priſcis Anglorum legibus.* Cambridge 1644.

‖ See the law of the Saxons, which makes this ſame regulation for ſeveral people, chap. 18. See alſo the law of the Ripuarians, tit. 36. §. 11. the law of the Bavarians, tit. 1. §. 10. & 11. *Si aurum non habet, donet aliam pecuniam, mancipia, terram,* &c.

In this light it is easy to conceive, that a person who had taken revenge after having received satisfaction, was guilty of a very great crime. This crime contained no less a public, than a private offence: it was a contempt of the law of itself: a crime which the legislators * never failed to punish.

There was another crime, which above all others was considered as dangerous †, when those people lost something of their spirit of independence, and when the kings endeavoured to establish a better civil administration: this was the refusing to give or to receive satisfaction. We find in the different codes of the laws of the Barbarians, that the legislators obliged ‖ them to it. In fact, a person who refused to receive satisfaction, wanted to preserve his right of prosecution; he who refused to give it, left the right of prosecution to the person injured; and this is what the sages had reformed in the institutions of the Germans, whereby people were invited but not compelled to compositions.

I have just now made mention of a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; 'tis the law § by which a person who had stripped a dead

* See the law of the Lombards, book i. tit. 25. §. 21. ibid. book i. tit. 9. §. 8. & 34. ibid. §. 38. and the capitulary of Charlemain in the year 802. chap. 32. containing an instruction given to those whom he sent into the provinces.

† See in Gregory of Tours, book vii. chap. 47. the detail of a process wherein a party loses half the composition that had been adjudged to him, for having done justice to himself, instead of receiving satisfaction, whatever injury he might have afterwards received.

‖ See the law of the Saxons, chap. 3. & 4. the law of the Lombards, book i. tit. 37. §. 1. & 2. and the law of the Alemans, tit. 45. §. 1. & 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See also the capitularies of Charlemain in the year 779. chap. 22. in the year 802. chap. 32. and also that of the year 805. chap. 5.

§ The compilers of the law of the Ripuarians seem to have softened this. See the 85th title of those laws.

dead body, was expelled from ſociety, till the relations upon receiving ſatisfaction petitioned for his being readmitted. It was owing to the reſpect they had for ſacred things, that the compilers of the Salic laws did not meddle with the ancient uſage.

It would have been abſolutely unjuſt to grant a compoſition to the relations of a robber who was killed in the fact, or to the relations of a woman who had been repudiated for the crime of adultery. The law (a) of the Bavarians allowed no compoſition in the like caſes, but puniſhed the relations who ſought for revenge.

(a) See the decree of Taſſillon, *de popularibus legibus*, art 3. 4. 10. 16. 19. the law of the Angli, tit. 7. §. 4.

'Tis no rare thing to meet with compoſitions for involuntary actions in the codes of the laws of the Barbarians. The law of the Lombards is generally very prudent; it (b) ordained, that in thoſe caſes the compoſition ſhould be according to the perſon's generoſity; and that the relations ſhould no longer be permitted to purſue their revenge.

(b) Book i. tit. ix. §. 4.

Clotharius the ſecond made a very wiſe decree: he forbad (c) the perſon robbed to receive any clandeſtine compoſition, and without an order from the judge. We ſhall ſee preſently the motive of this law.

(c) Pactus pro tenore pacis inter Childebertum & Clotarium, anno 593. & decreto Clotarii 2. regis, circa annum 595. chap. 11.

CHAP. XX.

Of what was afterwards called the juriſdiction of the lords.

BEſide the compoſition which they were obliged to pay to the relations for murders, or injuries, they were alſo under a neceſſity of paying a certain duty, which the codes of the barbarous laws call * *fredum*. We have no term in our modern lan-

* When it was not determined by the law, it was generally the third of what was given for the compoſition, as appears in the law of the Ripuarians, chap. 89. which is explained by the third capitulary of the year 813. Edition of Baluzius, tom. i. pag. 512.

Book XXX. Chap. 20.

guages to expreſs it; yet I intend to treat of it at large; and in order to give an idea of it, I begin with defining it a recompence for the protection granted againſt the right of proſecution.

The adminiſtration of juſtice among thoſe rude and unpoliſhed nations, was nothing more than granting to the perſon who had committed an offence, a protection againſt the proſecution of the party offended, and obliging the latter to accept of the ſatisfaction due to him: inſomuch that among the Germans, contrary to the practice of all other nations, juſtice was adminiſtered in order to protect the criminal againſt the party injured.

The codes of the Barbarian laws have given us the caſes in which theſe *freda* might be demanded. When the relations could not proſecute, they allow of no *fredum*; in fact, when there was no proſecution, there could be no compoſition for a protection againſt it. Thus, in the law of the (a) Lombards, if a perſon happened to kill a freeman by chance, he paid the value of the man killed without the *fredum*, becauſe as he had killed him involuntarily, it was not the caſe in which the relations were allowed the right of proſecution. Thus in the law of the (b) Ripuarians, when a man was killed with a piece of wood, or with any inſtrument made by man; the inſtrument or the wood were deemed culpable, and the relations ſeized upon them for their own uſe, but were not allowed to demand the *fredum*.

In like manner, when a beaſt happened to kill a man, the (c) ſame law eſtabliſhed a compoſition without the *fredum*, becauſe the relations of the deceaſed were not offended.

In fine, it was ordained by the (d) Salic law, that a child who had committed a fault before the age of twelve, ſhould pay the compoſition without the *fredum*: as he was not yet able to bear arms, he could not be in the caſe in which the party injured or his relations, had a right to demand ſatisfaction.

(a) Book i. tit. 9. §. 17. edition of *Lindenbrock.*

(b) Tit. 70.

(c) Tit. 46. See alſo the law of the Lombards, book i. chap. 21. §. 3. Lindenbrock's edition, *ſi caballus cum pede*, &c.

(d) Tit. 28. §. 6.

It

It was the criminal that paid the *fredum*, for the peace and ſecurity of which he had been deprived by his crime, and which he might recover by protection. But a child did not loſe this ſecurity; he was not yet a man, and conſequently could not be expelled from the ſociety of men.

This *fredum* was a local right in favour of the perſon who was * judge of the diſtrict. Yet the law of the Ripuarians (a) forbad him to demand it himſelf; it ordained, that the party who had gained the cauſe ſhould receive it and carry it to the fiſc, to the end that there might be an eternal peace, ſays the law, among the Ripuarians.

(a) Tit. 89.

The greatneſs of the *fredum* was proportioned to the greatneſs of the † protection: thus the *fredum* for the king's protection was greater than what was granted for the protection of the count, or of the other judges.

Here I ſee the origin of the juriſdiction of the lords. The fiefs comprized very large territories, as appears from a vaſt number of monuments. I have already proved that the kings raiſed no taxes on the lands belonging to the diviſion of the Franks; much leſs could they reſerve to themſelves any duties on the fiefs. Thoſe who obtained them, had in this reſpect a full and perfect enjoyment, reaping every advantage and poſſible emolument from them. And as one of the moſt conſiderable ‖ emoluments was the judiciary profits (*freda*), which were received according to the uſage of the Franks, it followed

* As appears by the decree of Clotharius II. in the year 595. *fredus tamen judici in cujus pago eſt reſervetur.*

† Capitulare incerti anni, chap. 57. in Baluzius, tom i. pag. 515. and 'tis to be obſerved, that what was called *fredum* or *faida*, in the monuments of the firſt race, is called by the name of *bannum* in thoſe of the ſecond race, as appears from the capitulary *de partibus Saxoniæ*, in the year 789.

‖ See the capitulary of Charlemain, *de villis*, where he ranks theſe *freda*, among the number of the great revenues of what was called *villæ*, or the king's domains.

Book XXX. Chap. 20.

from thence, that the perſon ſeized of the fief, was alſo ſeized of the juriſdiction, the exerciſe of which conſiſted of the compoſitions made to the relations, and of the profits accruing to the lord; it was nothing more than ordering the payment of the compoſitions of the law, and demanding the law fines.

We find by the formularies containing a confirmation of the perpetuity of a fief in favour of a feudal lord (a), or of the privileges of fiefs in favour of (b) churches, that the fiefs were poſſeſſed of this right. This appears alſo from an infinite number of charters (c), containing a prohibition to the king's judges or officers of entering upon the territory, in order to exerciſe any act of judicature whatſoever, or to demand any judiciary emolument. When the king's judges could no longer demand any thing in a diſtrict, they never entered it; and thoſe to whom this diſtrict was left, exerciſed the ſame functions as had been exerciſed before by the judges.

(a) See the 3d, 8th, and 17th formula, book i. of Marculfus.

(b) See the 2d, 3d, and 4th formula of Marculfus, book i.

The king's judges are forbidden alſo to oblige the parties to give ſecurity for their appearing before them: it belonged therefore to the perſon who had received the territory in fief, to demand this ſecurity. They mention alſo, that the king's commiſſaries ſhall no longer inſiſt upon being accomodated with a lodging; in effect, they no longer exerciſed any function in thoſe diſtricts.

(c) See the collections of thoſe charters, eſpecially that at the end of the 5th volume of the hiſtorians of France, publiſhed by the Benedictin monks.

The adminiſtration therefore of juſtice, both in the old and new fiefs, was a right inherent in the very fief itſelf, a lucrative right which conſtituted a part of it. For this reaſon it has been conſidered at all times in this light; from whence this maxim aroſe, that juriſdictions are patrimonial in France.

Some have thought that the juriſdictions derived their origin from the manumiſſions made by the kings and lords, in favour of their ſlaves. But the German nations, and thoſe deſcended from them, are not the only people who manumized their ſlaves,

and

and yet they are the only people that eſtabliſhed patrimonial juriſdictions. Beſides, we find by the formularies* of Marculfus, that there were freemen dependent on theſe juriſdictions in the earlieſt times: the ſlaves were therefore ſubject to the juriſdiction, becauſe they were upon the territory, and they did not give riſe to the fiefs for having been comprized in the fief.

Others have taken a ſhorter cut: the lords, ſay they, and this is all they ſay, uſurped the juriſdictions. But are the nations deſcended from Germany, the only people in the world that uſurped the rights of princes? We are ſufficiently informed by hiſtory, that ſeveral other nations have encroached upon their ſovereigns; and yet we find no other inſtance of what we call the juriſdiction of the lords. The origin of it is therefore to be traced in the uſages and cuſtoms of the Germans.

Whoever has the curioſity to look into Loyſeau (a), will be ſurpriſed at the manner in which this author ſuppoſes the lords to have proceeded, in order to form and uſurp their different juriſdictions. They muſt have been the moſt cunning people in the world; they muſt have robbed and plundered, not after the manner of a military people, but as the judges of a village and the attornies rob the poor people between them. Thoſe brave warriors muſt be ſaid to have formed throughout all the particular provinces of the kingdom, and in ſo many kingdoms, a general ſyſtem of politics: Loyſeau makes them reaſon, as he himſelf reaſoned in his cloſet.

(a) Treatiſe of village juriſdictions.

Once more: if the juriſdiction was not a dependance of the fief, how come we every where (b) to find, that the ſervice of the fief was to attend the king or the lord both in their courts and in the army?

(b) See Monſ. du Cange on the word *hominum*.

* See the 3d, 4th. and 14th of the firſt book, and the charter of Charlemain, in the year 771. in Martenne, tom. i Anecdot. collect. 11. *Præcipientes jubemus, ut ullus judex publicus . . . . homines ipſius eccleſiæ et monaſterii ipſius Morbacenſis, tam ingenuo quam et ſervos, & qui ſuper eorum terras manere*, &c.

CHAP. XXI.

Of the territorial juriſdiction of the churches.

BOOK XXX. Chap. 21.

THE churches acquired very conſiderable revenues. We find that our kings gave them great fiſcs, that is, great fiefs; and we find juriſdictions eſtabliſhed at the ſame time in the domains of thoſe churches. From whence could ſo extraordinary a privilege derive its origin? It muſt certainly have been given in the nature of the thing; the church land had this privilege, becauſe it had not been taken from it. A fiſc was given to the church; and it was allowed to enjoy the ſame privileges, as if it had been given to a vaſſal. It was alſo ſubjected to the ſame ſervice as it would have paid to the ſtate, if it had been granted to a layman, according to what we have already obſerved.

The churches had therefore the right of demanding the payment of compoſitions in their territory; and of inſiſting upon the *fredum*; and as thoſe rights neceſſarily implied that of hindering the king's officers from entering upon the territory, to demand theſe *freda* and to exerciſe acts of judicature, the right which the eccleſiaſtics had of adminiſtering juſtice in their own territory, was called *immunity*, in the ſtyle of the formularies (a), of the charters, and of the capitularies.

(a) See the 3d and 4th formulary of Marculfus, book i.

The law of the Ripuarians * forbids the freedmen † of the churches, to hold the aſſembly § for adminiſtering juſtice, in any other place than in the church where they were manumized. The churches had therefore juriſdictions even over freemen, and held their *placita* in the earlieſt times of the monarchy.

I find

* *Ne alicubi, niſi ad eccleſiam ubi relaxati ſunt, mallum teneant,* tit. 58. §. 1. See alſo §. 19. Lindenbrock's edition.

† Tabulariis.

§ Mallum.

I find in the lives of the ſaints, (a) that Clovis gave to a certain holy perſon a power over a diſtrict of ſix leagues, and exempted it from all manner of juriſdiction. This, I believe, is a falſity, but it is a falſity of a very ancient date; both the truth and the fiction contained in that life are relative to the cuſtoms and laws of thoſe times, and 'tis theſe cuſtoms (b) and laws we are inveſtigating.

(a) Vita S. Germeri Epiſcopi Toloſani apud Bollandianos, 16 Maii.

(b) See alſo the life of S. Melanius, and that of S. Deicola.

Clotharius II. orders * the biſhops or the nobility who are poſſeſſed of eſtates in diſtant parts, to chuſe upon the very ſpot thoſe who are to adminiſter juſtice, or to receive the judiciary emoluments.

The ſame prince (c) regulates the judiciary power between the eccleſiaſtic courts and his officers. The capitulary of Charlemain in the year 802 preſcribes to the biſhops and abbots, the qualifications neceſſary for their officers of juſtice. Another capitulary (d) of the ſame prince inhibits the royal officers, to exerciſe any juriſdiction over † thoſe who are employed in manuring church-lands, except they entered into that ſtate by fraud, and to exempt themſelves from contributing to the public charges. Another ‖ ordains that the churches ſhould have both criminal and civil juriſdiction, over thoſe who live upon their lands. In fine, as the capitulary (e) of Charles the Bald diſtinguiſhes between the king's juriſdiction, that of the lords, and that of the church; I ſhall ſay nothing further § upon this ſubject.

(c) Ibid. art. 5.

(d) In the law of the Lombards book ii. tit. 44. chap. 2. Lindenbrock's edition.

(e) In the year 857. *in ſynodo apud Cariſiacum* art. 4. edition of Baluzius, pag. 96.

CHAP.

* In the council of Paris, in the year 615. *Epiſcopi vel potentes qui in aliis poſſident regionibus, judices vel miſſos Diſcuſſores de aliis provinciis non inſtituunt, niſi de loco qui juſtitiam percipiant & aliis reddant.* art. 19. ſee alſo the 12th art.

† *Servi Aldiones, libellarii antiqui, vel alii noviter facti.* ibid.

‖ A capitulary of the year 806, it is added to the law of the Bavarians, art. 7. See alſo the 3d art. Lindenbrock's edition. pag. 444. *Imprimis omnium jubendum eſt, ut habeant eccleſiæ earum juſtitias, & in vita illorum qui habitant in ipſis eccleſiis, & poſt tam in pecuniis quam et in ſubſtantiis earum.*

§ See the letter written by the biſhops aſſembled at Rheims in the year 858. art. 7. in the capitularies, Baluzius's edition, pag. 108.

CHAP. XXII.

That the juriſdictions were eſtabliſhed before the end of the ſecond race.

Book XXX. Chap. 22.

IT has been pretended that the vaſſals uſurped the juriſdiction in their fiſcs, during the diſorders of the ſecond race. Thoſe who choſe rather to form a general propoſition than to examine it, found it eaſier to ſay that the vaſſals did not poſſeſs, than to diſcover how they came to poſſeſs. But the juriſdictions do not owe their origin to uſurpations; they are derived from the primitive eſtabliſhment, and not from its corruption.

(a) Tit. iii. chap. 13. Linden-brock's edition.

"He who kills a freeman, ſays (a) the law of "the Bavarians, ſhall pay a compoſition to his re- "lations, if he has any; if not, he ſhall pay it to "the duke or to the perſon under whoſe protection "he had put himſelf in his life-time." 'Tis well known what it was to put one's ſelf under the protection of another for a benefice.

(b) Tit. 85.

"He who has been robbed of his ſlave, ſays the "law of the Alemans (b), ſhall have recourſe to the "prince to whom the robber is ſubject; to the end "that he may obtain a compoſition.

"If a centenarius, ſays* the decree of Childebert, "finds a robber in another hundred than his own, "or in the limits of our faithful vaſſals, and does not "drive him out, he ſhall repreſent the robber, and "purge himſelf by oath." There was therefore a difference between the diſtrict of the centenarii and that of the vaſſals.

This

108. *Sicut illæ res & facultates in quibus vivunt clerici, ita et illæ ſub conſecratione immunitatis ſunt de quibus debent militare vaſſalli*, &c.

* In the year 595. art. 11. & 12. edition of the capitularies by Baluzius, pag. 19. *Pari conditione convenit, ut ſi una centena in alia centenâ veſtigium ſecuta fuerit & invenerit, vel in quibuſcunque fidelium noſtrorum terminis veſtigium miſerit, & ipſum in aliam centenam minimè expellere potuerit, aut convictus reddat latronem*, &c.

This decree * of Childebert explains the conſtitution of Clotharius in the ſame year, which being given for the ſame caſe and fact, differs only in the terms, the conſtitution calling *in truſte*, what by the decree is called *in terminis fidelium noſtrorum*. Meſſieurs Bignon and Ducange (a) who pretend that *in truſte* ſignified another king's domain, are miſtaken in their conjecture.

(a) See the Gloſſary on the word *truſtis*.

But, to finiſh the diſpute at once, the ſecond race, was neither in diſorder nor in its decline under Charlemain: during his reign there were no uſurpations. If then the patrimonial juriſdictions were eſtabliſhed in his time, this convenient ſyſtem falls of itſelf to the ground.

Pepin, king of Italy, in a conſtitution † that had been made as well for the Franks as for the Lombards, after impoſing penalties on the counts and other royal officers, for prevarications or delays in the adminiſtration of juſtice, ordains ‖ that if it happens that a Frank or a Lombard poſſeſſed of a fief is unwilling to adminiſter juſtice; the judge to whoſe diſtrict he belongs, ſhall ſuſpend the exerciſe of his fief, and in the mean time, either the judge or his commiſſary ſhall adminiſter juſtice.

It appears by a capitulary (b) of Charlemain, that the kings did not levy the *freda* in all places. Another (c) capitulary of the ſame prince repeals ſeveral articles of the Salic, Burgundian, and Roman law,

(b) The third of the year 812. art. 10.

(c) The ſecond of the year 813. Baluzius's edition.

* *Si veſtigium comprobatur latronis, tamen præſentia nihil longè mulctando; aut ſi perſequens latronem ſuum comprehenderit, integram ſibi compoſitionem accipiat. Quod ſi in truſte invenitur, medietatem compoſitionis truſtis adquirat, & capitale exigat à latrone*, art. 2. & 3.

† Inſerted in the law of the Lombards, book ii. tit. 52. §. 14. it is the capitulary of the year 793. in Baluzius, pag. 544. art. 10.

‖ *Et ſi forſitan Francus aut Longobardus habens beneficium juſtitiam facere noluerit, ille judex in cujus miniſterio fuerit contradicat illi beneficium ſuum, interim dum ipſe aut miſſus ejus juſtitiam faciat.* See alſo the ſame law of the Lombards, book ii. tit. 52. §. 2. which relates to the capitulary of Charlemain of the year 779. art. 21.

Book XXX. Chap. 22.

law, to the end that his * vaſſals may obſerve an uniformity in the adminiſtration of juſtice. By another (a) of the ſame prince we find the feudal laws, and feudal court already eſtabliſhed. Another of Lewis the Pious ordains, that when a perſon poſſeſſed of a fief, does not adminiſter juſtice †, or hinders it from being adminiſtered, the king's commiſſaries ſhall live upon him at diſcretion, till juſtice be adminiſtered. I ſhall ſtill quote two § capitularies of Charles the Bald, one of the year 861; where we find the particular juriſdictions eſtabliſhed, with judges and ſubordinate officers; and the other ‖ of the year 864, where he makes a diſtinction between his own ſeignories and thoſe of private people.

(a) The ſecond capitulary of the year 813.

We have not the original grants of the fiefs, becauſe they were eſtabliſhed by the diviſion which is known to have been made among the conquerors. It cannot therefore be proved by original contracts, that the juriſdictions were at firſt annexed to the fiefs: but if in the formularies of the confirmations, or of the tranſlations of thoſe fiefs in perpetuity, we find, as already has been obſerved, that the juriſdiction was there eſtabliſhed; this judiciary right muſt certainly have been inherent in the fief, and one of its chief prerogatives.

We have a far greater number of monuments that eſtabliſh the patrimonial juriſdiction of the clergy

* *Ut unuſquiſque fidelis juſtitias ita faceret.* Ibid.

† Capitulare quintum anni 819. art. 23. Baluzius's edition, pag. 617. *Ut ubicunque miſſi aut epiſcopum, aut abbatem, aut alium quemlibet honore præditum, invenerint, qui juſtitiam facere noluit vel prohibuit, de ipſius rebus vivant quamdiu in eo loco juſtitias facere debent.*

§ *Edictum in Cariſiaco in* Baluzius, tom. ii. pag. 152. *unuſquiſque advocatus pro omnibus de ſuâ advocatione . . . . in convenientia, ut cum miniſterialibus de ſuâ advocatione quos invenerit contra hunc bannum noſtrum feciſſe . . . . caſtiget.*

‖ *Edictum Piſtenſe.* art. 18. Baluzius's edition, tom. ii. pag. 181. *Si in fiſcum noſtrum, vel in quamcunque immunitatem, aut alicujus potentis poteſtatem vel proprietatem confugerit,* &c.

clergy in their diſtricts, than we have to prove that of the benefices or fiefs of the feudal lords; for which there are two reaſons. The firſt, that moſt of the monuments now extant, were preſerved or collected by the monks, for the uſe of their monaſteries. The ſecond, that the patrimony of the ſeveral churches having been formed by particular grants, and by a kind of exception to the order eſtabliſhed, they were obliged to have charters granted to them; whereas the conceſſions made to the feudal lords being conſequences of the political order, they had no occaſion to demand, and much leſs to preſerve a particular charter. Nay, the kings were oftentimes ſatisfied with making a ſimple delivery with the ſcepter, as appears by the life of S. Maur.

But the third formulary * of Marculfus ſufficiently proves, that the privileges of immunity and conſequently that of juriſdiction, were common to the clergy and the laity, being made for both.

CHAP. XXIII.

General idea of the Abbe Du Bos's *book, on the eſtabliſhment of the* French *monarchy in* Gaul.

BEfore I finiſh this book, 'tis proper I inquire a little into the Abbe du Bos's work, becauſe my notions are perpetually contrary to his; and if he has hit the truth, I muſt have miſſed it.

This work has impoſed upon a great many people, becauſe it is written with a vaſt deal of art; becauſe the point in queſtion is conſtantly ſuppoſed; becauſe the more it is deficient in proofs, the more it abounds in probabilities; and, in fine, becauſe an infinite number of conjectures are laid down as principles, and from thence other conjectures are inferred as conſequences. The reader forgets

* Lib. i. *Si beneficia oppertuna locis eccleſiarum, aut cui voluerit dicere....*

gets he has been doubting, in order to begin to believe. And as a prodigious fund of erudition is interſperſed, not in the ſyſtem, but around it, the mind is taken up with the appendages, and neglects the principal. Beſides, ſuch a vaſt multitude of reſearches hardly permit one to imagine that nothing has been found; the length of the way makes us think we are arrived at our journey's end.

But when we examine thoroughly, we find an immenſe coloſſus with earthen feet; and 'tis the earthen feet that render the coloſſus immenſe. If the Abbe du Bos's ſyſtem had been well grounded, he would not have been obliged to write three huge volumes to prove it; he would have found every thing within his ſubject, without wandering on every ſide in queſt of what was extremely foreign to it. Even reaſon itſelf would have undertaken to range this in the ſame chain with other truths. Our hiſtory and laws would have told him: *Do not take ſo much trouble, we ſhall be your vouchers.*

CHAP. XXIV.

The ſame ſubject continued. Reflection on the main part of the ſyſtem.

THE Abbe du Bos endeavours by all means to explode the received opinion, that the Franks made the conqueſt of Gaul. According to his ſyſtem our kings were invited by the people, and only ſubſtituted themſelves in the place, and ſucceeded to the rights, of the Roman emperors.

This pretention cannot be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns; neither is it applicable to the time when he defeated Siagrius the Roman commander, and conquered the country which he held; it can therefore be referred only to the time when Clovis, already maſter of a great part of Gaul by open force, was called by the choice and affection of

of the people to the ſovereignty of the reſt of the country; and it is not enough that Clovis was received, he muſt have been called; the Abbe du Bos muſt prove that the people choſe rather to live under Clovis, than under the domination of the Romans, or under their own laws. Now the Romans belonging to that part of Gaul not yet invaded by the Barbarians, were, according to this author, of two ſorts; the firſt were of the Armorican confederacy, who had driven away the emperor's officers, in order to defend themſelves againſt the Barbarians, and to be governed by their own laws; the ſecond were ſubject to the Roman officers. Now does this gentleman produce any convincing proof, that the Romans who were ſtill ſubject to the empire, called in Clovis? not one. Does he prove that the republic of the Armoricans invited Clovis, or even concluded any treaty with him? not at all. So far from being able to tell us the fate of this republic, he cannot even ſo much as prove its exiſtence; and notwithſtanding he pretends to trace it from the time of Honorius to the conqueſt of Clovis, notwithſtanding he relates with a moſt admirable exactneſs all the events of thoſe times, ſtill this republic remains inviſible in ancient authors. For there is a wide difference between proving a paſſage of Zozymus (a), that under the emperor Honorius, the * country of Armorica and the other provinces of Gaul revolted and formed a kind of a republic; and ſhewing us that notwithſtanding the different pacifications of Gaul, the Armoricans always formed a particular republic, which continued till the conqueſt of Clovis; and yet this is what he ſhould have ſhewn by ſtrong and ſubſtantial proofs, in order to eſtabliſh his ſyſtem. For when we behold a conqueror entering a country, and ſubduing a great part of it by force and open violence, and ſoon after

(a) Hiſt. lib. vi.

* *Totuſque tractatus Armoricus aliæque Galliarum provinciæ.* Ibid.

Book XXX. Chap. 24.

after we find the whole country ſubdued, without any mention in hiſtory of the manner of its being effected, we have ſufficient reaſon to believe that the affair ended as it began.

When we find he has miſtaken this point, it is eaſy to perceive that his whole ſyſtem falls to the ground; and as often as he infers a conſequence from theſe principles, that Gaul was not conquered by the Franks, but that the Franks were invited by the Romans, we may ſafely deny it.

This author proves his principle, by the Roman dignities with which Clovis was inveſted: he inſiſts that Clovis ſucceeded to Chilperic his father, in the office of *magiſter militiæ*. But theſe two offices are merely of his own creation. S. Remigius's letter to Clovis, on which he grounds his opinion (a), is only a congratulation upon his acceſſion to the crown. When the intent of a writing is ſo well known, why ſhould we give it another turn?

(a) Tom. ii. book 3. chap. 18. pag. 270.

Clovis, towards the end of his reign, was made conſul by the emperor Anaſtaſius: but what right could he receive from an authority that laſted only one year? 'Tis very probable, ſays our author, that in the ſame diploma the emperor Anaſtaſius made Clovis proconſul. And, I ſay, 'tis very probable, he did not. With regard to a fact for which there is no foundation, the authority of him who denies, is equal to that of him who affirms. But I have alſo a reaſon for denying it. Gregory of Tours, who mentions the conſulate, ſays not a word concerning the proconſulate. And even this proconſulate could have laſted only about ſix months. Clovis died a year and an half after he was made conſul; and we cannot pretend to make the proconſulate an hereditary office. In fine, when the conſulate, and, if you will, the proconſulate were conferred upon him, he was already maſter of the monarchy, and all his rights were eſtabliſhed.

The

The ſecond proof alledged by the Abbe du Bos, is the renunciation made by the emperor Juſtinian, in favour of the children and grand-children of Clovis, of all the rights of the empire over Gaul. I could ſay a great deal concerning this renunciation. We may judge of the regard ſhewn to it by the kings of the Franks, from the manner in which they performed the conditions of it. Beſides, the kings of the Franks were maſters, and peaceable ſovereigns of Gaul; Juſtinian had not one foot of ground in that country; the weſtern empire had been deſtroyed a long time before; and the eaſtern empire had no right to Gaul, but as repreſenting the emperor of the weſt. Theſe were rights to rights; the monarchy of the Franks was founded; the regulation of their eſtabliſhment was made, the reciprocal rights of the perſons and of the different nations who lived in the monarchy, were agreed on; the laws of each nation were given, and even reduced, in writing. What could therefore that foreign renunciation avail, to a government already eſtabliſhed?

What can the Abbe mean by making ſuch a parade of the declamations of all thoſe biſhops, who in the midſt of the diſorder, confuſion, and total ſubverſion of the ſtate, as well as in the ravages of conqueſt, endeavour to flatter the conqueror? What elſe is implied by flattering, but the weakneſs of him who is obliged to flatter? What does rhetoric and poetry prove, but the uſe of thoſe very arts? Is it poſſible to help being ſurpriſed at Gregory of Tours, who after mentioning the aſſaſſinations committed by Clovis, ſays, that God notwithſtanding laid his enemies every day at his feet, becauſe he walked in his ways? Who doubts but the clergy were glad of Clovis's converſion, and that they even reaped great advantages from it? But who doubts at the ſame time, that the people experienced all the miſeries of conqueſt, and that the Roman government ſubmitted to that of the Franks?

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The Franks were neither willing nor able to make a total change; and few conquerors were ever seized with so great a degree of madness. But to render all the Abbe du Bos's consequences true, they must not only have made no change amongst the Romans, but they must have even changed themselves.

I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I would set out with mentioning the treaties which some of their cities concluded with the Persians: I would mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Persian territories, besieged, took, and destroyed the city of Tyre, it was only a particular affair like that of Syagrus. But, behold the Jewish pontiff goes out to meet him. Listen to the oracle of Jupiter Hammon. Recollect how he had been predicted at Gordium. See what a number of towns, crowd as it were, to submit to him; and how all the Satraps and grandees come to pay him obeisance. He puts on the Persian dress; this is Clovis's consular robe. Does not Darius offer him one half of his kingdom? Is not Darius assassinated like a tyrant? Do not the mother and wife of Darius weep at the death of Alexander? Were Quintus Curtius, Arrian, or Plutarch, Alexander's cotemporaries? Has not the invention of * printing afforded us great lights, which those authors wanted? Such is the history of the *establishment of the French monarchy in Gaul.*

CHAP. XXV.
Of the French *nobility.*

THE Abbe du Bos maintains, that in the commencement of our monarchy there was only one order of citizens among the Franks. This assertion,

* See the preliminary discourse of the Abbe du Bos.

ſertion, ſo injurious to the blood of our principal families, is equally affronting to the three great houſes which ſucceſſively governed this realm. The origin of their grandeur would not therefore be loſt in oblivion, night, and time. Hiſtory would point out the ages when they were common families; and to make Childeric, Pepin, and Hugh Capet gentlemen, we ſhould be obliged to trace their pedigree among the Romans or Saxons, that is, among the conquered nations.

This author grounds (a) his opinion on the Salic law. By this law, he ſays, it plainly appears, that there were not two different orders of citizens among the Franks: it allowed a compoſition * of two hundred ſous for the murder of any Frank whatſoever; but among the Romans it diſtinguiſhed the king's gueſt, for whoſe death it gave a compoſition of three hundred ſous, from the Roman proprietor to whom it granted an hundred, and from the Roman tributary to whom it gave only a compoſition of forty-five. And as the difference of the compoſitions formed the principal diſtinction, he concludes that there was but one order of citizens among the Franks, and three among the Romans.

(a) See the eſtabliſhment of the French monarchy, vol. iii. book 6. chap. 4. pag. 304.

It is aſtoniſhing that his very miſtake did not ſet him right. In fact, it would have been vaſtly extraordinary that the Roman nobility who lived under the domination of the Franks, ſhould have a larger compoſition and been perſons of much greater importance than the moſt illuſtrious among the Franks, and their greateſt generals. What probability is there, that the conquering nation ſhould have ſo little reſpect for themſelves, and ſo great a regard for the conquered people? Beſides, our author quotes the laws of other barbarous nations, which prove that they had different orders of citizens. Now it would be very extraordinary indeed

* He cites the 44th title of this law, and the law of the Ripuarians, tit. 7. & 36.

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that this general rule ſhould have failed only among the Franks; this ought to have made him conclude either that he did not rightly underſtand, or that he miſapplied the paſſages of the Salic law, which is actually the caſe.

Upon opening this law, we find that the compoſition for the death of an Antruſtio *, that is, of the king's vaſſal, was ſix hundred ſous; and that for the death of a Roman, who was the (a) king's gueſt, was only three hundred. We find there that (b) the compoſition for the death of an ordinary Frank (c) was two hundred ſous; and for the death of an ordinary Roman (d), was only one hundred. For the death of a Roman (e) tributary, who was a kind of ſlave or freedman, they paid a compoſition of forty-five ſous: but I ſhall take no notice of this, no more than of the compoſition for the murder of a Frank ſlave or of a Frank freedman, becauſe this third order of perſons is out of the queſtion.

(a) Salic law, tit. 44. §. 6.
(b) Ibid. tit. 44. §. 4.
(c) Tit. 44. §. 1.
(d) Tit. 44. §. 15.
(e) Salic law, tit. 44. §. 7.

What does our author do? He is quite ſilent in reſpect to the firſt order of perſons among the Franks, that is, the article relating to the Antruſtios; and afterwards upon comparing the ordinary Frank, for whoſe death they paid a compoſition of two hundred ſous, with thoſe whom he diſtinguiſhes under three orders among the Romans, and for whoſe death they paid different compoſitions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As this gentleman is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one

* *Qui in truſte dominicâ eſt.* tit. 44. §. 4. and this relates to the 13th formulary of Marculfus, *de regis Antruſtione.* See alſo the title 66. of the Salic law, §. 3. & 4. and the title 74. and the law of the Ripuarians, tit. 11. and the capitulary of Charles the Bald *apud Caviſiacum*, in the year 877. chap. 20.

one order alſo among the Burgundians, becauſe their kingdom conſtituted one of the principal parts of our monarchy. But in their codes * we find three ſorts of compoſitions, one for the Burgundian or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for thoſe of a lower rank in both nations. He has not quoted this law.

'Tis very extraordinary to ſee in what manner he evades (a) thoſe paſſages which preſs him hard on all ſides. If you ſpeak to him of the grandees, lords, and the nobility: theſe, he ſays, are mere diſtinctions of reſpect, and not of order; they are things of courteſy, and not prerogatives of laws; or elſe, he ſays, thoſe people belonged to the king's council; nay, they poſſibly might be Romans, but ſtill there was only one order of citizens among the Franks. On the other hand, if you ſpeak to him of ſome Franks of an inferior rank (b), he ſays, they are ſlaves; and thus he interprets the decree of Childebert. But I muſt ſtop here a little, to inquire further into this decree. Our author has rendered it famous by availing himſelf of it in order to prove two things; the one (c) that all the compoſitions we meet with in the laws of the Barbarians, were only civil intereſts added to corporal puniſhments, which intirely ſubverts all the ancient monuments; the other, that all freemen were judged directly and immediately by the king (d), which is contradicted by an infinite number of paſſages and authorities, that inform us of the (e) judiciary order of thoſe times.

This decree, which was made in an aſſembly † of the

(a) Eſtabliſhment of the French monarchy vol. iii. book 6. chap. 4. & 5.

(b) Eſtabliſhment of the French monarchy vol. iii. chap. 5. pag. 319. & 320.

(c) Ibid. vol. iii. book 6. chap. 4. pag. 307. & 308.

(d) Ibid. pag. 309. and in the following chapter, pag. 319. & 320.

(e) See the 28th book of this work, chap. 28. and the 31ſt book & chap. 8.

* *Si quis quolibet caſu dentem optimati Burgundioni vel Romano nobili excuſſerit, ſolidos viginti quinque cogatur exſolvere; de mediocribus perſonis ingenuis, tam Burgundionibus quam Romanis, ſi dens excuſſus fuerit, decem ſolidis componatur, de inferioribus perſonis, quinque ſolidos.* art. 1. 2. & 3. of tit. 26. of the law of the Burgundians.

† *Itaque Colonia convenit & ita bannivimus ut unuſquiſque judex criminoſum latronem ut audierit, ad caſam ſuam ambulet,*

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the nation, ſays, that if the judge finds a notorious robber, he muſt command him to be tied, in order to be carried before the king, if he is a Frank (*Francus*); but if he is a weaker perſon (*debilior perſona*), he ſhall be hanged upon the ſpot. According to the Abbe du Bos, *Francus* is a freeman, *debilior perſona* is a ſlave. I ſhall defer entering for a moment into the ſignification of the word *Francus*, and begin with examining what can be underſtood by theſe words, *a weaker perſon*. In all languages whatſoever, every comparative neceſſarily ſuppoſeth three terms, the greateſt, the leſſer, and the ſmalleſt. If none were here meant but freemen and ſlaves, they would have ſaid *a ſlave*, and not *a man of a leſſer power*. Wherefore *debilior perſona* does not ſignify a ſlave, but a perſon of a ſuperior condition to a ſlave. Upon this ſuppoſition, *Francus* cannot mean a freeman but a powerful man; and this word is taken here in that acceptation, becauſe among the Franks there were always men who had a greater power in the ſtate, and it was more difficult for the judge or count to chaſtiſe them. This explication agrees very well with a great number of capitularies (a), where we find the caſes in which the criminals were to be carried before the king, and thoſe in which it was otherwiſe.

(a) See the 28th book of this work, chap. 28, and the 31ſt book, chap. 8.

We find in the life of Lewis the Pious (b), written by Tegan, that the biſhops were the principal cauſe of the humiliation of this emperor, eſpecially thoſe who had been ſlaves, and thoſe who were born among the Barbarians. Tegan thus addreſſes Hebo, whom this prince had drawn from the ſtate of ſervitude, and made archbiſhop of Rheims. "*What recompence* * *did the emperor receive from you for*

(b) Chap. 43. & 44.

"*ſo*

& ipſum ligare faciat; ita ut ſi Francus fuerit, ad noſtram preſentiam dirigatur, & ſi debilior perſona fuerit, in loco pendatur. Capitulary, of Baluzius's edition, tom. i. pag. 19.

* *O qualem remunerationem reddidiſti ei! fecit te liberum, non nobilem, quod impoſſibile eſt poſt libertatem.* Ibid.

" *ſo many benefits? He made you a freeman, but did* " *not ennoble you, becauſe he could not give you no-* " *bility after having given you your liberty.*"

This diſcourſe which proves ſo ſtrongly the two orders of citizens, does not at all confound the Abbe du Bos. He anſwers thus (a): *The meaning of this paſſage is not, that Lewis the Pious was incapable of introducing Hebo into the order of the nobility. Hebo, as archbiſhop of Rheims, muſt have been of the firſt order, ſuperior to that of the nobility.* But I leave the reader to judge, whether this be not the meaning of that paſſage; I leave him to judge whether there can be any queſtion here concerning a precedency of the clergy over the nobility. *This paſſage proves only*, continues the ſame writer (b), *that the free-born ſubjects were qualified as noblemen; in the common acceptation, noblemen and men who are free-born have for this long time ſignified the ſame thing.* What! becauſe ſome of our burghers have lately aſſumed the quality of noblemen, ſhall a paſſage of the life of Lewis the Pious be applied to this ſort of people? *And perhaps*, continues he ſtill (c), *Hebo had not been a ſlave among the Franks, but among the Saxons, or ſome other German nation, where the people were divided into ſeveral orders.* Then becauſe of the Abbe du Bos's *perhaps* there muſt have been no nobility among the nation of the Franks. But he never applied a *perhaps* ſo badly. We have ſeen that Tegan * diſtinguiſhes the biſhops, who had oppoſed Lewis the Pious, ſome of whom had been ſlaves, and others of a barbarous nation. Hebo belonged to the firſt, and not to the ſecond. Beſides, I do not ſee how a ſlave ſuch as Hebo, can be ſaid to have been a Saxon or German: a ſlave has no family, and conſequently no nation. Lewis the

(a) Eſtabliſhment of the French monarchy vol. iii. book 6. chap 4. pag. 3, 6.

(b) Ibid.

(c) Ibid.

* *Omnes epiſcopi moleſti fuerunt Ludovico, & maximè ii quos è ſervili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc faſtigium perducti ſunt. De geſtis Ludovici Pii*, cap. 43. & 44.

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Pious manumized Hebo; and as ſlaves after their manumiſſion, embraced the law of their maſter, Hebo was become a Frank, and not a Saxon or German.

I have been hitherto acting offenſively; 'tis now time to defend myſelf. It will be objected to me, that indeed the body of the Antruſtios formed a diſtinct order in the ſtate, from that of the freemen: but as the fiefs were at firſt precarious, and afterwards for life: this could not form a nobleneſs of deſcent, ſince the prerogatives were not annexed to an hereditary fief. This is the objection which induced Mr. de Valois to think, that there was only one order of citizens among the Franks; an opinion which the Abbe du Bos has borrowed of him, and which he has abſolutely ſpoiled with ſo many bad arguments. Be that as it will, 'tis not the Abbe du Bos that could make this objection. For after having given three orders of Roman nobility, and the quality of the king's gueſt for the firſt, he could not pretend to ſay, that this title was a greater mark of a noble deſcent than that of Antruſtio. But I muſt give a direct anſwer. The Antruſtios or truſty men were not ſuch, becauſe they were poſſeſſed of a fief, but they had a fief given them becauſe they were Antruſtios or truſty men. The reader may pleaſe to recollect what has been ſaid in the firſt chapters of this book. They had not at that time, as they had afterwards, the ſame fief: but if they had not that, they had another, becauſe the fiefs were given at their birth, and becauſe they were often given in the aſſemblies of the nation, and, in fine, becauſe as it was the intereſt of the nobility to have them, it was likewiſe the king's intereſt to give them. Theſe families were diſtinguiſhed by their dignity of truſty men, and by the prerogative of being qualified to vow fealty for a fief. In the following book (a), I ſhall ſhew, that by the circumſtances of time there were freemen, who

(a) Chap. 33.

who were permitted to enjoy this great prerogative, and conſequently to enter into the order of nobility. It was not ſo at the time of Gontram, and his nephew Childebert; but ſo it was at the time of Charlemain. But tho' in that prince's reign the freemen were not incapable of poſſeſſing fiefs, yet it appears by the above-cited paſſage of Tegan, that the freedmen were abſolutely excluded. Will the Abbe du Bos (a), who carries us to Turky, to give us an idea of the ancient French nobility; will he, I ſay, pretend that they ever complained in Turky of the elevation of people of low birth to the honors and dignities of the ſtate, as they complained under Lewis the Pious and Charles the Bald? There was no complaint of this kind under Charlemain, becauſe this prince always diſtinguiſhed the ancient from the new families; which Lewis the Pious and Charles the Bald did not.

(a) Eſtabliſhment of the French monarchy vol. iii. book 6. chap. 4. pag. 302.

The public ſhould not forget the obligation it has to the Abbe du Bos for ſeveral excellent performances. 'Tis by theſe works, and not by his hiſtory of the eſtabliſhment of the French monarchy we ought to judge of his merit. He fell into very great miſtakes, becauſe he had more in view the count of Boulainvilliers's work, than his own ſubject.

From all theſe criticiſms I ſhall draw only one reflection: if ſo great a man was miſtaken, what ought not I to fear?

BOOK

BOOK XXXI.

Theory of the feudal laws among the Franks, *in the relation they bear to the revolutions of their monarchy.*

CHAP. I.

Changes in the offices and in the fiefs. Of the mayors of the palace.

Book XXXI. Chap. 1.

THE counts at firſt were ſent into their diſtricts only for a year; but they ſoon purchaſed the continuation of their offices. Of this we have an example in the reign of Clovis's grand-children. A perſon named Peonius (a) was count in the city of Auxerre; he ſent his ſon Mammolus with money to Gontram, to prevail upon him to continue him in his employment; the ſon gave the money for himſelf, and obtained the father's place. The kings had already begun to ſpoil their own favours.

(a) Gregory of Tours, book iv. chap. 42.

Tho' by the laws of the kingdom the fiefs were precarious, yet they were neither given nor taken away in a capricious and arbitrary manner; nay, they were generally one of the principal ſubjects debated in the national aſſemblies. It is natural however to imagine that corruption had ſeized this, as well as the other article; and that the poſſeſſion of the fiefs, like that of the counties, was continued for money.

I ſhall ſhew in the courſe of this book (b), that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the grants that had been made; this occaſioned a general diſcontent in the nation, and was ſoon followed with that famous revolution in the French hiſtory, whoſe firſt epoch

(b) Chap. 7.

epoch was the amazing ſpectacle of the execution of Brunechild.

It appears at firſt extraordinary, that this queen, who was daughter, ſiſter, and mother to ſo many kings, a princeſs to this very day famous for works worthy of an edile or a Roman proconſul, born with an admirable genius for affairs, endowed with qualities ſo long reſpected, ſhould ſee herſelf (a) of a ſudden expoſed to ſo tedious, ſo ſhameful and cruel a torture, by (b) a king whoſe authority was but indifferently eſtabliſhed in the nation; if ſhe had not incurred that nation's diſpleaſure for ſome particular cauſe. Clotharius reproached (c) her with the murder of ten kings: but two of them he had put to death himſelf; the death of ſome of the others was owing to chance, or to the villainy of another queen; and a nation that had permitted Fredegunda (d) to die in her bed, that had even oppoſed the puniſhment of her flagitious crimes, ought to have been very indifferent in reſpect to thoſe of Brunechild.

(a) Fredegarius's chronicle, chap. 42.

(b) Clotharius II. ſon of Chilperic, and father of Dagobert.

(c) Fredegarius's chronicle. chap. 42.

She was put upon a camel, and led ignominiouſly through the army; a certain ſign that ſhe had given great offence to that army. Fredegarius relates that Protarius *, Brunechild's favourite, ſtripped the lords of their property and filled the fiſc with the plunder; that he humbled the nobility, and that no perſon could be ſure of the poſt he held. The army conſpired againſt him, and he was ſtabbed in his tent; but Brunechild either by revenging † his death, or by purſuing the ſame plan, became every day more odious ‖ to the nation.

(d) See Gregory of Tours, book viii, chap. 31.

Clotharius,

* *Sæva illi fuit contra perſonas iniquitas, fiſco nimium tribuens, de rebus perſonarum ingenioſe fiſcum vellens implere - - - - ut nullus reperiretur qui gradum quem arripuerat potuiſſet adſumere.* Fredeg. Chron. cap. 27. in the year 605.

† Ibid. cap. 28. in the year 607.

‖ Ibid. cap. 41. in the year 613. *Burgundiæ Farones tam epiſcopi quam cæteri Leudes, timentes Brunechildem, & odium in eam habentes, conſilium inientes,* &c.

BOOK XXXI. Chap. 1.

Clotharius, ambitious of reigning alone, inflamed moreover with the moſt furious revenge, and ſure of periſhing if Brunechild's children got the upper hand, entered into a conſpiracy againſt himſelf; and whether it was owing to ignorance, or to the neceſſity of his circumſtances, he became Brunechild's accuſer, and made a terrible example of that princeſs!

Warnacharius had been the very ſoul of the conſpiracy formed againſt Brunechild; being at that time mayor of Burgundy, he made * Clotharius conſent that he ſhould not be diſplaced while he lived. By this means the mayor could no longer be in the ſame caſe, as the French lords before that time; and this authority began to render itſelf independent of the regal dignity.

It was Brunechild's unhappy regency, which had exaſperated the nation. As long as the laws ſubſiſted in their full force, no one could complain for having been deprived of a fief, ſince the law did not beſtow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being deprived by irregular means, of things that had been irregularly acquired. Perhaps if the public good had been the motive of the revocation of thoſe grants, nothing would have been ſaid: but they made a ſhew of order, without concealing the corruption; the fiſcal rights were claimed, in order to laviſh the public treaſure; and grants were no longer the reward or the encouragement of ſervices. Brunechild, through a corrupt ſpirit, wanted to reform the abuſes of the ancient corruption. Her caprices did not proceed from weakneſs: the vaſſals and the great officers thought themſelves in danger; wherefore they prevented their own, by her ruin.

We

* Ibid. cap. 42. in the year 613. *Sacramento a Clotharío accepto, ne unquam vitæ ſuæ temporibus degradaretur.*

We are far from having all the records of what was tranſacted in thoſe days; and the writers of chronicles, who underſtood very near as much of the hiſtory of their time, as our country clowns know of ours, were extremely barren. And yet we have a conſtitution of Clotharius, given * in the council of Paris for the reformation of † abuſes, which ſhews that this prince put a ſtop to the complaints that had occaſioned the revolution. On the one hand, he confirms ‖ all the grants that had been made or confirmed by the kings his predeceſſors; and, on the other, he ordains § that whatever had been taken from his vaſſals, ſhould be reſtored to them.

This was not the only conceſſion the king made in this council; he enjoined that whatever had been innovated, in oppoſition to the privileges of the clergy, ſhould be corrected **; and he moderated the influence of the court in the §§ elections of biſhops. He even reformed the fiſcal affairs; ordaining that all the new ‖‖ cenſus's ſhould be aboliſhed, that they ſhould not levy any †† toll eſtabliſhed ſince the death of Gontram, Sigebert, and Chilperic; that is, he aboliſhed whatever had been done during the regencies of Fredegunda and Brunechild. He forbad

* Some time after Brunechild's execution, in the year 615. See Baluzius's edition of the capitularies, pag. 21.

†*Quæ contra rationis ordinem acta vel ordinata ſunt, ne in antea, quod avertat divinitas, contingant, diſpoſuerimus Chriſto præſule, per hujus edicti tenorem generaliter emendare.* Ibid. art. 16.

‖ Ibid. art. 16.

§ Ibid. art. 17.

*******Et quod per tempora ex hoc prætermiſſum eſt, vel debinc perpetualiter obſervetur.*

§§*Ita ut epiſcopo decedente in loco ipſius, qui a metropolitano ordinari debet, cum principalibus a clero & populo eligatur, & ſi perſona condigna fuerit, per ordinationem principis ordinetur, vel certe ſi de palatio eligitur, per meritum perſonæ & doctrinæ ordinetur.* Ibid art. 1.

‖‖*Ut ubicunque cenſus novus impiè additus eſt, emendetur.* art. 8.

†† Ibid. art. 9.

Book XXXI. Chap. 2.

forbad the driving of his cattle to * graze in private people's grounds; and we ſhall preſently ſee that the reformation was ſtill more general, and extended even to civil affairs.

CHAP. II.

How the civil government was reformed.

Hitherto the nation had been ſeen to give marks of impatience and levity, in reſpect to the choice or conduct of her maſters; ſhe had been ſeen to regulate their differences, and to oblige them to come to an agreement amongſt themſelves. But now ſhe did what before was quite unexampled; ſhe caſt her eyes on her actual ſituation, ſhe examined the laws cooly, provided againſt their inſufficiency, put a ſtop to violence, and moderated the regal power.

The maſculine, bold, and inſolent regencies of Fredegunda and Brunechild, had leſs ſurpriſed than warned the nation. Fredegunda had defended her villainies by new villainies; ſhe had juſtified her poiſonings and aſſaſſinations by poiſonings and aſſaſſinations; and ſhe had behaved in ſuch a manner that her outrages were rather of a private than public nature. Fredegunda did more miſchief: Brunechild threatened more. In this criſis, the nation was not ſatisfied with ſetting the feudal government to rights, ſhe was alſo determined to ſecure her civil government. For the latter was rather more corrupt than the former, and this corruption was ſo much the more dangerous as it was more ancient, and depended more in ſome meaſure on the abuſe of manners than on that of laws.

The Hiſtory of Gregory of Tours ſhews us, on the one hand a fierce and barbarous nation; and on the other, kings of as bad a character. Theſe princes were bloody, unjuſt, and cruel, becauſe all the nation was ſo. If chriſtianity ſeemed ſometimes to

* Ibid. art. 21.

to ſoften them, it was only by the terror which this religion imprints in the guilty; the church ſupported herſelf againſt them by the miracles and prodigies of her ſaints. The kings were not addicted to ſacrilege, becauſe they dreaded the puniſhments inflicted on ſacrilegious people: but this excepted, they committed either in their paſſion or in cool blood all manner of crimes and injuſtice, becauſe in theſe the revengeful hand of the deity did not appear ſo viſible. The Franks, as I have already obſerved, bore with bloody kings, becauſe they were fond of blood themſelves; they were not affected with the wickedneſs and extortions of their princes, becauſe this was their own character. There had been a great many laws eſtabliſhed, but the king rendered them all uſeleſs, by a kind of letters called *preceptions* *, which ſubverted thoſe laws: theſe were in the nature of the reſcripts of the Roman emperors, whether it be that our kings borrowed this uſage of them, or derived it from their own natural diſpoſition. We ſee in Gregory of Tours, how they committed murders in cool blood, and put the accuſed to death, who had not been ſo much as heard; they gave *preceptions* † for illicit marriages; they gave them for transferring ſucceſſions; they gave them for depriving relations of their right; and they gave them, in fine, to qualify men to marry conſecrated virgins. They did not indeed make laws of their own motion, but they ſuſpended the execution of thoſe that had been already made.

Clotharius's conſtitution redreſſed all theſe grievances; no one (a) could any longer be condemned without being heard; relations (b) were made to ſucceed

(a) Art. 22.
(b) Ibid. art. 6.

* They were orders which the king ſent to the judges to do or to tolerate things contrary to law.

† See Gregory of Tours, book iv. pag. 227. Both our hiſtory and the charters are full of this; and the extent of theſe abuſes appears eſpecially in Clotharius's conſtitution, inſerted in the edition of the capitularies made to reform them. Baluzius's edition, pag. 7.

Book XXXI. Chap. 2.

ceed according to the order eſtabliſhed by law; all *preceptions* for marrying religious women, were made null(a); and thoſe who had obtained and made uſe of them, were ſeverely puniſhed. We might know perhaps more exactly his determinations with regard to theſe *preceptions*, if the thirteenth and the two next articles of this decree, had not been loſt through the injury of time. We have only the firſt words of this thirteenth article, ordaining that the *preceptions* ſhall be obſerved, which cannot be underſtood of thoſe he had juſt aboliſhed by the ſame law. We have another conſtitution (b) by the ſame prince, which is relative to his decree, and corrects in the ſame manner, every article of the abuſes of the *preceptions*.

(a) Ibid.

(b) In Baluzius's edition of the capitularies; tom. i. pag. 7.

True it is that Baluzius finding this conſtitution without date, and without the name of the place where it was given, attributes it to Clotharius I. But I ſay it belongs to Clotharius II. for three reaſons; 1. it ſays that the king will preſerve the immunities * granted to the churches, by his father and grandfather. What immunities could the churches receive from Childeric grandfather of Clotharius I. who was not a chriſtian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotharius II. we ſhall find his grandfather to have been this very Clotharius I. who made immenſe donations to the church, with a view of expiating the murder of his ſon Cramne, whom he had ordered to be burnt, together with his wife and children.

2. The abuſes redreſſed by this conſtitution, were ſtill ſubſiſting after the death of Clotharius I. and were even carried to their higheſt extravagance during the weakneſs of Gontram's reign, the cruelty of

* In the preceding book I have made mention of theſe immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

of that of Chilperic, and the execrable regencies of Fredegunda and Brunechild. Now is it poſſible that the nation could have bore with grievances ſo ſolemnly proſcribed, without ever complaining of the continual repetition of thoſe grievances? Is it poſſible, that ſhe could forbear doing at that time what ſhe did afterwards, when Childeric II. (a) renewing the old oppreſſions, ſhe preſſed (b) him to ordain that the law and cuſtoms ſhould be complied with as formerly, in judicial proceedings.

(a) He began to reign towards the year 670.

(b) See the life of St. Leger.

In fine, as this conſtitution was made to redreſs grievances, it cannot relate to Clotharius I. ſince there were no complaints of this kind in his reign, and his authority was well eſtabliſhed throughout the kingdom, eſpecially at the time in which they place this conſtitution; whereas it agrees very well with the events which happened during the reign of Clotharius II. which produced a revolution in the political ſtate of the kingdom. We muſt clear up hiſtory by the laws, and the laws by hiſtory.

CHAP. III.

Authority of the mayors of the palace.

I Have ſaid that Clotharius II. had promiſed not to deprive Warnacharius of his mayor's place during life. This revolution had another effect; before this time the mayor was the king's officer, but now he became the officer of the people; he was choſen before by the king, and now by the nation. Before the revolution, Protarius had been made mayor by Theodoric, and * Landeric by Fredegunda; but (c) after that, the mayors were choſen by the nation †.

(c) Geſta regum Francorum, chap. 36.

We

* Inſtigante Brunechilde, Theodorico jubente, &c. Fredegarius, chap. 27. in the year 605.

† See Fredegarius's chronicle, chap. 54. in the year 626. and his anonymous continuator, chap. 191. in the year 695.

BOOK XXXI. Chap. 3.

We must not therefore confound, as some authors have done, these mayors of the palace with those who were possessed of this dignity before the death of Brunechild; the king's mayors with those of the kingdom. We see by the law of the Burgundians, that among them this office of mayor was not one of the (a) first in the state; nor was it one of the most eminent (b) under the first kings of the Franks.

(a) See the law of the Burgundians in *præfat.* and the second supplement to this law, tit. 13.

Clotharius removed the apprehensions of those who were possessed of employments and fiefs; and when after the death of Warnacharius * he asked the lords assembled at Troyes, who is it they would put in his place? they cried out they would chuse no one, and petitioning for his favour they intrusted themselves entirely into his hands.

(b) See Gregory of Tours, book ix. chap. 36.

Dagobert reunited the whole monarchy in the same manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This prince finding himself at liberty, and elated by his victories, resumed Brunechild's plan. But this succeeded so ill, that the vassals of Austrasia let themselves † be beaten by the Sclavonians, and returned home; so that the frontiers of Austrasia were left a prey to the Barbarians.

He determined then to make an offer to the Austrasians, of resigning Austrasia to his son Sigebert, together

and chap. 105. in the year 715. Aimoin, book iv. chap. 15. Eginhards life of Charlemain, chap. 48. *Gesta regum Francorum* chap. 45.

* *Eo anno Clotarius cum proceribus & leudibus Burgundiæ Trecassinis conjungitur, cum eorum esset sollicitus, si vellent, jam Warnachario discesso, alium in ejus honoris gradum sublimare; sed omnes unanimiter denegantes se nequaquam velle majorem-domus eligere, regis gratiam obnixe petentes cum rege transegere.* Fredegarius, chronicle, chap. 54. in the year 626.

† *Istam victoriam quam Winidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse & assidue expoliarentur.* Fredegarius's chronicle, chap. 68. in the year 630.

together with a treaſure, and to put the government of the kingdom and of the palace into the hands of Cuniebert biſhop of Cologne, and of the duke Adalgiſus. Fredegarius does not enter into the particulars of the conventions then made; but the king confirmed them all by charters, and * Auſtraſia was immediately ſecured from danger.

Dagobert finding himſelf near his end, recommended his wife Nentechildis, and his ſon Clovis to the care of Ægа. The vaſſals of Neuſtria and Burgundy choſe (a) this young prince for their king. Ægа and Nentechildis had the government of (b) the palace; they reſtored (c) whatever Dagobert had taken; and complaints ceaſed in Neuſtria and Burgundy, as they had ceaſed before in Auſtraſia.

(a) Fredegarius's chronicle, chap. 79. in the year 638.

After the death of Ægа, the queen Nentechildis (d) engaged the lords of Burgundy to chuſe Floachatus for their mayor. The latter diſpatched letters to the biſhops and chief lords of the kingdom of Burgundy, by which he promiſed to preſerve their honors and dignities † for ever, that is, during life. He confirmed his word by oath. This is the period, to which ‖ the author of the treatiſe of the mayors of the palace fixes the adminiſtration of the kingdom by thoſe officers.

(b) Ibid.

(c) Ibid. chap. 80. in the year 639.

(d) Ibid. chap. 89. in the year 641.

Fredegarius being a Burgundian, has entered into a more minute detail, as to what concerns the mayors of Burgundy, at the time of the revolution of which we are ſpeaking, than as to what relates to the mayors of Auſtraſia and Neuſtria. But the con-

* *Deinceps Auſtraſii, eorum ſtudio, limitem & regnum Francorum contra Winidos utiliter defenſaſſe noſcuntur.* Fredegarius's chronicle, chap. 75. in the year 632.

† Ibid. cap. 89. *Floachatus cunctis ducibus a regno Burgundiæ ſeu et pontificibus per epiſtolam etiam et ſacramentis firmavit unicuique gradum honoris et dignitatem, ſeu et amicitiam perpetuo conſervare.*

‖ *Deinceps à temporibus Clodovei, qui fuit filius Dagoberti inclyti regis, pater verò Theodorici, regnum Francorum decidens per majores domus cæpit ordinari.* De majoribus domus regiæ.

ventions made in Burgundy were, for the very ſame reaſons, agreed to in Neuſtria and Auſtraſia.

The nation thought it ſafer to lodge the power in the hands of a mayor whom ſhe choſe herſelf, and to whom ſhe might preſcribe conditions, than in thoſe of a king whoſe power was hereditary.

CHAP. IV.

Of the genius of the nation in regard to the mayors.

A Government, in which a nation that had an hereditary king, choſe a perſon who was to exerciſe the royal authority, ſeems very extraordinary: but independently of the circumſtances of thoſe times, I find that the notions of the Franks in this reſpect were derived from a higher ſource.

They were deſcended from the Germans, of whom Tacitus * ſays, that in the choice of their king they were determined by his nobility; and in that of their leader, by his valour. Here is the origin of the kings of the firſt race, and of the mayors of the palace; the former were hereditary, the latter elective.

No doubt but thoſe princes, who ſtood up in the aſſembly of the nation and offered themſelves as the conductors of an enterpriſe to ſuch as were willing to follow them, united generally in their own perſon both the king's authority and the mayor's power. By their noble blood they had attained the royal dignity; and their valour having procured them ſeveral followers who pitched upon them for their leaders, it gave them the power of mayor. By the royal dignity our firſt kings preſided in the tribunals and aſſemblies, and gave laws with the conſent of thoſe aſſemblies; by the dignity of duke or leader they

* *Reges ex nobilitate, duces ex virtute ſumunt.* De moribus Germanorum.

they entered upon expeditions, and commanded armies. Book XXXI. Chap. 5.

In order to be acquainted with the genius of the primitive Franks in this reſpect, we have only to caſt an eye on the conduct (a) of Argobaſtes, a Frank by nation, on whom Valentinian had conferred the command of the army. He ſhut the emperor up in his own palace; where he would not ſuffer any perſon whatſoever to ſpeak to him concerning either civil or military affairs. Argobaſtes did at that time what was afterwards practiſed by the Pepins.

(a) See Sulpicius Alexander in Gregory of Tours, book ii.

CHAP. V.

In what manner the mayors obtained the command of the armies.

AS long as the kings commanded their armies in perſon, the nation never thought of chuſing a leader. Clovis and his four ſons were at the head of the Franks, and led them on through a long ſeries of victories. Theobald ſon of Theodobert, a young, weak, and ſickly prince, was the firſt (b) of our kings that confined himſelf to his palace. He refuſed to engage in an expedition in Italy againſt Narſes, and he had * the mortification to ſee the Franks chuſe themſelves two chiefs, who led them againſt the enemy. Of the four ſons of Clotharius I. Gontram † was the leaſt fond of commanding his armies; the other kings followed this example; and, in order to intruſt the command without danger into other hands, they conferred it upon ſeveral chiefs or dukes ‖.

(b) In the year 552.

* *Leutharis verò et Butilinus, tametſi id regi ipſorum minime placebat, belli cum eis ſocietatem inierunt.* Agathias, book i. Gregory of Tours, book iv. chap. 9.

† Gontram did not even march againſt Gondovald who ſtiled himſelf ſon of Clotharius, and claimed his ſhare of the kingdom.

‖ Sometimes to the number of twenty. See Gregory of Tours, book v. chap. 27. book viii. chap. 18. & 30. book x. chap.

Book XXXI. Chap. 5.

Innumerable were the inconveniences which thence aroſe; all diſcipline was loſt, no one would any longer obey. The armies were dreadful only to their own country; they were loaden with ſpoils, before they reached the enemy. Of theſe miſeries we have a very lively picture in Gregory of Tours (a). *How ſhall we be able to obtain a victory*, ſaid Gontram (b) *we who do not ſo much as keep what our anceſtors acquired? Our nation is no longer the ſame.* . . . . . Strange, that it ſhould be on the decline ſo early as the reign of Clovis's grandchildren!

(a) Gregory of Tours, book viii. chap. 30. and book x. chap. 3.

(b) Ibid. Ibid. book viii. chap. 30.

It was therefore natural that they ſhould determine at laſt upon an only duke, a duke who was to be veſted with an authority over this prodigious multitude of feudal lords and vaſſals, who were now become ſtrangers to their own engagements; a duke who was to eſtabliſh the military diſcipline, and to put himſelf at the head of a nation unhappily practiſed in making war againſt itſelf. This power was conferred on the mayors of the palace.

The original function of the mayors of the palace, was the management of the king's houſhold. They had afterwards, in conjunction (c) with other officers, the political government of the fiefs; and at length they obtained the ſole diſpoſal of them. They had alſo the adminiſtration of military affairs and the command of the armies; and theſe two employments were neceſſarily connected with the other two. In thoſe days, it was much more difficult to raiſe than to command the armies; and who but the diſpenſer of favours could have this authority? In this martial and independent nation, it was prudent to invite, rather than to compel; it was prudent to give away, or to promiſe the fiefs that ſhould happen to be vacant by the death of the poſſeſſor; it was prudent,

(c) See the ſecond ſupplement to the law of the Burgundians, tit. 13. and Gregory of Tours, book ix. chap. 36.

chap. 3. Dagobert, who had no mayor in Burgundy, obſerved the ſame policy, and ſent againſt the Gaſcons ten dukes and ſeveral counts who had no dukes over them. Fredegarius's chronicle, chap. 78. in the year 636.

dent, in fine, to reward continually, and to cauſe preferences to be dreaded. It was therefore right, that the perſon who had the ſuperintendency of the palace, ſhould alſo be general of the army.

CHAP. VI.

Second epocha of the humiliation of our kings of the firſt race.

AFTER the execution of Brunechild, the mayors were adminiſtrators of the kingdom under the kings; and though they had the management of the war, yet the kings were always at the head of the armies, and the mayor and the nation fought under their command. But the victory (a) of duke Pepin over Theodoric and his mayor, completed * the degradation of our kings; and that (b) which Charles Martel obtained over Chilperic and his mayor Rainfroy, confirmed it. Auſtraſia triumphed twice over Neuſtria and Burgundy; and the mayoralty of Auſtraſia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly ſuperior to all the reſt. The conquerors were then afraid leſt ſome perſon of credit ſhould ſeize the king's perſon, in order to excite diſturbances. For this reaſon they kept * them in the royal palace as in a kind of priſon, and once a year they ſhewed them to the people. There they made ordinances, but † they were ſuch as were dictated by the mayor; they anſwered ambaſſadors, but the mayor made the anſwers. This is the time mentioned by ‖ hiſtorians of the government of the

(a) See the annals of Metz, year 687. and 688.

(b) Annals of Metz, year 719.

† *Illis quidem nomina regum imponens, ipſe totius regni habens privilegium, &c.* Annals of Metz, year 695.

† *Sedemque illi regalem ſub ſuâ ditione conceſſit.* Ibid anno 719.

§ *Ex chronico Centulenſi*, lib. ii. *ut reſponſa quæ erat edoctus vel potius juſſus, ex ſua velut poteſtate, redderet.*

‖ Annals of Metz, anno 691. *Anno principatus Pippini ſuper Theodoricum* - - - - Annals of Fuld, or of Lauriſham, *Pippinus dux Francorum obtinuit regnum Francorum per annos 27. cum regibus ſibi ſubjectis.*

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mayors over the kings whom they held in ſubjection.

The extravagant paſſion of the nation for Pepin's family went ſo far, that they choſe one of his grandſons who was yet § an infant for mayor; they put him over one Dagobert, that is, one phantom over another.

CHAP. VII.

Of the great offices and fiefs, under the mayors of the palace.

THE mayors of the palace were far from reviving the precariouſneſs of poſts and employments; for indeed their grandeur was owing to the protection which in this reſpect they had granted to the nobility. Hence the great offices were contined to be given for life, and this uſage was every day more firmly eſtabliſhed.

But I have ſome particular reflections to make here in reſpect to fiefs: and in the firſt place I do not queſtion but moſt of them became hereditary from this time.

In the treaty of Andeli (a), Gontram and his nephew Childebert engage to maintain the donations made to the vaſſals and churches by the kings his predeceſſors; and leave is given to the * wives, daughters, and widows of kings, to diſpoſe by will and in perpetuity of whatever they hold of the fiſc.

Marculfus wrote his formularies at the time (b) of the mayors. We find ſeveral† in which the kings make

(a) Cited by Gregory of Tours, book ix. See alſo the edict of Clotharius II. in the year 615. art. 16.

(b) See the 24th and the 34th of the firſt book.

Poſthæc Theudoaldus filius ejus (Grimoaldi) parvulus, in loco ipſius, cum prædicto rege Dagoberto, major-domus palatii effectus eſt. The anonymous continuator of Fredegarius in the year 714. chap. 104.

† *Ut ſi quid de agris fiſcalibus vel ſpeciebus atque præſidio, pro arbitrii ſui voluntate, facere ut cuiquam conferre voluerint, fixa ſtabilitate perpetuo conſervetur.*

§ See the 14th formula of the firſt book, which is equally applicable to the fiſcal eſtates given directly and in perpetuity; or given at firſt as a benefice, and afterwards in perpetuity; *ſicut ab illo aut a fiſco noſtro fuit poſſeſſa.* See alſo the 17th formula, ibid.

make donations both to the perſon and to his heirs: and as the formularies are images of the common actions of life, they prove that part of the fiefs were become hereditary towards the end of the firſt race. They were far from having in thoſe days the idea of an unalienable domain; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof we ſhall preſently produce no leſs than poſitive facts; and if I can ſhew a time in which there were no longer any benefices for the army, nor any funds for its ſupport; we muſt certainly conclude that the ancient benefices had been alienated. The time I mean is that of Charles Martel, who founded ſome new fiefs which we ſhould carefully diſtinguiſh from thoſe of the earlieſt date.

When the kings began to make grants in perpetuity, either through the corruption which crept into the government, or by reaſon of the conſtitution itſelf which continually obliged the kings to confer rewards; it was natural that they ſhould begin with giving the perpetuity of the fiefs, rather than of the counties. For to deprive themſelves of ſome acres of land was no great matter; but to renounce the right of diſpoſing of the great offices, was diveſting themſelves of their very power.

CHAP. VIII.

In what manner the allodial eſtates were changed into fiefs.

THE manner of changing an allodial eſtate into a fief, may be ſeen in a formulary of Marculfus (a). The owner of the land gave it to the king, who reſtored it to the donor by way of uſufruit, or benefice, and then the latter nominated his heirs to the king.

(a) Book i. formulary 13.

In order to find out the reaſons which induced them thus to change the nature of their *allodia*, I muſt

must trace the ſource of the ancient prerogatives of our nobility, a nobility who for theſe eleven centuries have been covered with duſt, ſweat, and blood.

Thoſe who were ſeized of fiefs enjoyed very great advantages. The compoſition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus, that it was a privilege belonging to the king's vaſſal, that whoever killed him ſhould pay a compoſition of ſix hundred ſous. This privilege was eſtabliſhed by the Salic law (a), and by that of the Ripuarians (b); and at the ſame time that theſe two laws ordained a compoſition of ſix hundred ſous for the murder of the king's vaſſal, they gave but (c) two hundred for the murder of a perſon freeborn, if he was a Frank or Barbarian living under the Salic law; and only a hundred for a Roman.

This was not the only privilege belonging to the king's vaſſals. When (d) a man was ſummoned in court, and did not make his appearance, nor obey the judges orders, he was appealed before the king; and if he perſiſted in his contumacy, he was excluded from * the king's protection, and no one was allowed to entertain him, or even to give him a morſel of bread. Now, if he was a perſon of an ordinary condition, his goods (e) were confiſcated; but if he was the king's vaſſal, they were not (f). The firſt by his contumacy was deemed ſufficiently convicted of the crime, the ſecond was not; the former (g) for the ſmalleſt crimes was obliged to undergo the trial by boiling water, the latter (h) was condemned to this trial only in the caſe of murder: In fine, the king's vaſſal (i) could not be compelled to ſwear in court againſt another vaſſal. Theſe privileges augmented daily, and the capitulary of Carlomannus (k) does this honor to the king's vaſſals, that they ſhall not be obliged to ſwear in perſon, but only by the mouth of their own vaſſals. Beſides,

(a) Tit. 44. See alſo the titles 66. §. 3. & 4. & tit. 74.

(b) Tit. 11.

(c) See alſo the law of the Ripuarians, tit. 7. and the Salic law, tit. 44. art. 1. & 4.

(d) Salic law. tit. 59. & 76.

(e) Ibid. tit. 59. §. 1.

(f) Ibid. tit. 76. §. 1.

(g) Ibid. tit. 56. & 59.

(h) Ibid. tit. 76. §. 1.

(i) Ibid. tit. 76. §. 2.

(k) Apud Vernis Palatium, in the year 883. art. 4. & 11.

* *Extra ſermonem regis*, Salic law, tit. 59, & 76.

ſides, when a perſon who had theſe honors did not repair to the army, his puniſhment was to abſtain from fleſh-meat and wine, as long as he had been abſent from the ſervice; but a freeman (a) who neglected to follow his count, payed a compoſition * of ſixty ſous, and was reduced to ſlavery till he paid it.

(a) Capitulary of Charlemain, in the year 812. art. 1. & 3.

It is very natural therefore to think that thoſe Franks who were not the king's vaſſals, and much more the Romans, became fond of entering into the ſtate of vaſſalage; and that they might not be deprived of their domains, they deviſed the uſage of giving their *allodium* to the king, of receiving it from him afterwards as a fief, and of nominating to him their heirs. This uſage was always continued, and took place eſpecially during the diſorders of the ſecond race, when every body ſtood in need of a protector, and wanted to incorporate himſelf with † the other lords, and to enter as it were, into the feudal monarchy, becauſe the political no longer exiſted.

This continued under the third race, as we find by ſeveral ‖ charters; whether they gave their *allodium*, and reſumed it by the ſame act; or whether it was declared in *allodium*, and afterwards acknowledged as a fief. Theſe fiefs were called *fiefs of reſumption*.

This does not imply, that thoſe who were ſeized of fiefs adminiſtered them like prudent fathers of families; for though the freemen grew deſirous of being poſſeſſed of fiefs, yet they managed this ſort of eſtates as uſufruits are managed in our days. This is what induced Charlemain, the moſt vigilant and attentive prince we ever had, to make a great many

* *Heribanum.*

† *Non infirmis reliquit hæredibus*, ſays *Lambert d'Ardres* in Du Change on the word *alodis*.

‖ See thoſe quoted by Du Cange in the word *alodis*, and thoſe produced by Galland, in his treatiſe of allodial lands, pag. 14. and the following.

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many regulations (a), to hinder the fiefs from being degraded in favour of allodial eſtates. This proves only that in his time moſt benefices were ſtill only for life, and conſequently that they took more care of the *allodia*, than of the benefices; but this is no argument, that they did not chuſe rather to be the king's vaſſals than freemen. They might have reaſons for diſpoſing of a particular portion of a fief, but they were not willing to be ſtripped even of their dignity.

(a) Second capitulary of the year 802. art. 10. and the 7th capitulary of the year 803. art. 3. the 1ſt capitulary *incerti anni*, art. 49. the 5th capitulary of the year 806, art. 7. the capitulary of the year 779. art. 29. and the capitulary of Lewis the Pious, in the year 829. art. 1.

I know likewiſe that Charlemain complains in a certain capitulary (b), that in ſome places there were people who gave away their fiefs in property, and redeemed them afterwards in property. But I do not ſay, that they were not fonder of the property than of the uſufruit; I mean only, that when they could convert an *allodium* into a fief, which was to deſcend to their heirs, and is the caſe of the formulary above-mentioned, they had very great advantages in doing it.

(b) The 5th of the year 806. art. 8.

CHAP. IX.

How the church-lands were converted into fiefs.

THE uſe of the fiſcal lands ſhould have been only to ſerve as donations, by which the kings were to encourage the Franks to undertake new expeditions, and by which on the other hand theſe fiſcal lands were increaſed. This, as I have already obſerved, was the ſpirit of the nation; but theſe donations took another turn. There is ſtill extant (c) a ſpeech of Chilperic, grandſon of Clovis, in which he complains that almoſt all theſe lands had been already given away to the church. *Our fiſc*, ſays he, *is impoveriſhed, and our riches are transferred to the clergy* *; *none reign now but biſhops, who live in grandeur, while our grandeur is over.*

(c) In Gregory of Tours, book vi. chap. 46.

This

* This is what induced him to annul the teſtaments made in favour of the clergy. and even the donations of his father; Gontram

This was the reaſon that the mayors who durſt not attack the lords, ſtripped the churches; and one of the * motives alledged by Pepin for entertaining Neuſtria, was his having been invited thither by the clergy, to put a ſtop to the encroachments of the kings, that is of the mayors, who ſtripped the church of all her poſſeſſions.

The mayors of Auſtraſia, that is, the family of the Pepins, had behaved towards the clergy with more moderation than thoſe of Neuſtria and Burgundy. This is evident by our chronicles (a), in which we ſee the monks eternally admiring the devotion and liberality of the Pepins. They themſelves had been poſſeſſed of the firſt places in the church. *One crow does not pull out the eyes of another*; as (b) Chilperic ſaid to the biſhops.

(a) See the annals of Metz.

(b) In Gregory of Tours.

Pepin ſubdued Neuſtria and Burgundy; but as his pretence for deſtroying the mayors and kings was the oppreſſion of the clergy, he could not ſtrip them without contradicting his own title, and ſhewing that he made a jeſt of the nation. However the conqueſt of two great kingdoms and the deſtruction of the oppoſite party, afforded him ſufficient means of ſatisfying his generals.

Pepin made himſelf maſter of the monarchy, by protecting the clergy; his ſon Charles Martel could not maintain his power, but by oppreſſing them. This prince finding that part of the regal and fiſcal lands had been given either for life, or in perpetuity to the nobility, and that the clergy by receiving both from rich and poor, had acquired a great part even of the allodial eſtates, he ſtripped the church; and as the fiefs of the firſt diviſion were no longer in being, he formed a ſecond diviſion †.

He

Gontram re-eſtabliſhed them, and made even new donations. Gregory of Tours, book vii. chap. 7.

* See the annals of Metz, year 687. *Excitor imprimis querelis ſacerdotum & ſervorum Dei, qui me ſæpius adierunt ut pro ſublatis injuſtè patrimoniis, &c.*

†*Carolus plurima juri eccleſiaſtico detrahens prædia fiſco ſociavit ac deinde militibus diſpertivit.* Ex Chronico Centulenſi, lib. ii.

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He took for himſelf and for his officers the church-lands, and the churches themſelves; and put a ſtop to an evil which differed in this reſpect from ordinary evils, that by being extreme, it was ſo much the more eaſy to cure.

CHAP. X.

Riches of the clergy.

SO great were the donations made to the clergy, that under the three races of our princes they muſt have poſſeſſed at different times all the lands of the kingdom. But if our kings, nobility, and people, found the way of giving them all their eſtates, they found alſo the method of getting them back again. The ſpirit of religion founded a great number of churches under the firſt race; but the military ſpirit was the cauſe of their being given away afterwards to the ſoldiery, who divided them amongſt their children. What a number of lands muſt have then been taken from the clergy's *menſalia!* The kings of the ſecond race opened their hands, and made new donations to them; but the Normans, who came afterwards, plundered and ravaged all before them, perſecuting eſpecially the prieſts and monks, and continually ſearching out for abbeys and other religious foundations. In this ſituation what a loſs muſt the clergy have ſuſtained! There were ſcarce eccleſiaſtics enough left to demand the eſtates of which they had been deprived. There remained therefore for the religious piety of the third race, foundations enough to make, and lands to beſtow. The opinions which were broached and ſpread in thoſe days would have deprived the laity of all their eſtates, if they had been but honeſt enough. But, if the clergy were full of ambition, the laity were not without theirs; if they gave their eſtates upon their death-bed to the church, their ſucceſſors wanted to reſume them. We meet with

with nothing but continual quarrels between the lords and the biſhops, the gentlemen and the abbots; and the clergy muſt have been very hard ſet, ſince they were obliged to put themſelves under the protection of certain lords, who defended them for a moment, and afterwards oppreſſed them.

But now a better adminiſtration, which had been eſtabliſhed under the third race, gave the clergy leave to augment their poſſeſſions; when the Calviniſts ſallied forth, and coined money of all the gold and ſilver they found in the churches. How could the clergy be ſure of their eſtates, when they were not even ſure of their perſons? They were treating of controverſial ſubjects, while their archives were burning. What did it avail them to demand again of a ruined nobility what theſe were no longer poſſeſſed of, or what they had mortgaged a thouſand ways? The clergy have conſtantly acquired, conſtantly refunded, and yet are ſtill acquiring.

CHAP. XI.

State of Europe *at the time of* Charles Martel.

CHarles Martel, who undertook to ſtrip the clergy, found himſelf in a moſt happy ſituation. He was both feared and loved by the ſoldiery; whoſe intereſt he promoted, having the pretence of his wars againſt the Saracens. He was hated indeed by the clergy, but (a) he had no need of them. The pope, to whom he was neceſſary, ſtretched out his arms to him. Every one knows the famous embaſſy * he received from Gregory III. Theſe two powers were greatly united, becauſe they could not do one without the other; the pope ſtood in need of the Franks to ſupport him againſt the Lombards

(a) See the annals of Metz.

* *Epiſtolam quoque decreto Romanorum principum ſibi prædictus præſul Gregorius miſerat, quod ſeſe populus Romanus, relicta imperatoris dominatione, ad ſuam defenſionem & invictam clementiam convertere voluiſſet.* Annals of Metz, year 74. *Eo pacto patrato, ut a partibus imperatoris recederet.* Fredegarius.

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bards and the Greeks; the Franks had occaſion for the pope, to ſerve for a barrier againſt the Greeks, and to embarraſs the Lombards. It was impoſſible therefore for the enterpriſe of Charles Martel to miſcarry.

St. Eucherius biſhop of Orleans, had a viſion which frightened all the princes of that time. I muſt produce to this purpoſe the letter (a) written by the biſhops aſſembled at Rheims to Lewis king of Germany, who had invaded the territories of Charles the Bald, becauſe it will ſhew us the ſtate of things in thoſe times, and the diſpoſition of people's minds. They ſay (b), "That St. Eucherius having been ſnatched up into heaven, he ſaw Charles "Martel tormented in the bottom of hell by order "of the ſaints, who are to aſſiſt with Jeſus Chriſt "at the laſt judgment; that he had been condemned to this puniſhment before his time, for having ſtript the churches of their poſſeſſions, and "thereby rendered himſelf guilty of the ſins of "all thoſe who had endowed them; that king Pepin had held a council upon this occaſion: that "he had ordered all the church-lands he could recover to be reſtored to the church; that as he "could get back only a part of them, becauſe of "his diſputes with *Vaifre* duke of Aquitaine, he "iſſued out * *precarious* letters in favour of the churches for the remainder, and made a law that the "laity ſhould pay a tenth part of the church lands "they poſſeſſed, and twelve deniers for each houſe; "that Charlemain did not give the church lands away, on the contrary that he made a capitulary, "by which he engaged both for himſelf and for "his

(a) Anno 858. apud Cariſiacum; Baluzius's edition. tom. II pag. 131.

(b) Ibid. art. 7. pag. 109.

* *Precaria, quod precibus utendum conceditur*, ſays Cujas in his notes upon the firſt book of fiefs. I find in a diploma of king Pepin, dated the firſt year of his reign, that this prince was not the firſt who eſtabliſhed theſe *precarious* letters; he cites one made by the mayor *Ebroin*, and continued after his time. See the diploma of this king, in the 5th tom. of the hiſtorians of France by the Benedictions. art. 6.

" his ſucceſſors never to give them away; that all " they ſay is committed to writing, and that a great " many of them heard the whole related by Lewis " the Pious, the father of thoſe two kings."

King Pepin's regulation, mentioned by the biſhops, was made in the council held at Leptines (a). The church found this advantage in it, that ſuch as had received thoſe lands, held them no longer but in a precarious manner, and moreover that ſhe received the tythe or tenth part and twelve deniers for every houſe that had belonged to her. But this was only a palliative, which did not remove the diſorder.

(a) In the year 743. ſee the 5th book of the capitularies, art. 3. Baluzius's edition, pag. 825.

This even met with oppoſition, and Pepin was obliged to make another capitulary (b), in which he enjoins thoſe who held any of thoſe benefices to pay this tythe and duty, and even to keep up the houſes belonging to the biſhoprick or monaſtery, under the penalty of forfeiting thoſe poſſeſſions. Charlemain * renewed the regulations of Pepin.

(b) That of Metz, in the year 756. art. 4.

That part of the ſame letter which ſays, that Charlemain promiſed both for himſelf and for his ſucceſſors, never to divide again the church-lands among the ſoldiery, is agreeable to the capitulary of this prince, given at Aix la Chapelle, in the year 803. with a view of removing the apprehenſions of the clergy upon this ſubject. But the donations already made were ſtill † continued. The biſhops very juſtly add, that Lewis the Pious followed the example

* See his capitulary in the year 803, given at Worms, Baluzius's edition, pag. 411. where he regulates the *precarious* contract; and that of Franckfort, in the year 794. pag. 267. art. 24. in relation to the repairing of the houſes; and that of the year 800, pag. 330.

† As appears by the preceding note, and by the capitulary of Pepin king of Italy, where it ſays, that the king would give the monaſteries in fief to thoſe who would vow fealty for fiefs: it is added to the law of the Lombards, book iii. tit. 1. §. 30. and to the Salic laws, collection of Pepin's laws, in Echard, pag. 195. tit. 26. art. 4.

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example of Charlemain, and did not give away the church-lands to the ſoldiery.

And yet the old abuſes were carried to ſuch a pitch, that the laity under the children (a) of Lewis the Pious, introduced prieſts into their churches, or drove them away, without the conſent of the biſhops. the churches (b) were divided amongſt the next heirs, and when they were held in an indecent manner, the biſhops (c) had no other remedy left than to remove the relics.

By the capitulary (d) of Compiegne, it is enacted, that the king's commiſſary ſhall have a right to viſit every monaſtery, together with the biſhop, by the conſent * and in the preſence of the perſon who holds it; and this general rule ſhews that the abuſe was general.

Not that there were laws wanting for the reſtitution of the church-lands. The pope having reproached the biſhops for their neglect in regard to the re-eſtabliſhment of the monaſteries, they wrote to Charles the Bald (e) that they were not affected with this reproach, becauſe they were not culpable; and they reminded him of what had been promiſed, reſolved and decreed in ſo many national aſſemblies. In fact, they quoted nine.

Still they went on diſputing; till the Normans came and made them all agree.

(a) See the conſtitution of Lotharius I. in the law of the Lombards, book iii. law 1. §. 43.

(b) Ibid. §. 44.

(c) Ibid.

(d) Given the 28th year of the reign of Charles the Bald in the year 868. Baluzius's edition, pag. 203.

(e) *Conſilium apud Bonoilum*, the 16th year of Charles the Bald, in the year 856. Baluzius's edition, pag. 78.

CHAP. XII.

Eſtabliſhment of the tithes.

THE regulations made under king Pepin had given the church rather hopes of relief, than effectively relieved her; and as Charles Martel found all the landed eſtates in the hands of the clergy, Charlemain found all the church-lands in the hands of the ſoldiery. The latter could not be forced to reſtore what had been given them; and the circumſtances

* *Cum conſilio & conſenſu ipſius qui locum retinet.*

cumſtances of that time rendered the thing ſtill more impracticable than it was of its own nature. On the other hand, chriſtianity ought not to have periſhed for want of miniſters *, churches, and inſtructions.

This was the reaſon of Charlemain's eſtabliſhing (a) the tithes, a new kind of property, which had this advantage in favour of the clergy, that as they were given particularly to the church, it was eaſier in proceſs of time to know when they were uſurped.

Some have attempted to make this eſtabliſhment of an earlier date, but the authorities they produce ſeem rather, I think, to prove the contrary. The conſtitution of Clotharius† ſays only, that they ſhall not raiſe certain ‖ tithes on church-lands: ſo far then was the church from exacting tithes at that time, that its whole pretenſion was to be exempted from paying them. The ſecond council (b) of Macon, which was held in 585, and ordains the payment of tithes, ſays indeed, that they were paid in ancient times; but it ſays alſo, that the cuſtom of paying them was at that time aboliſhed.

No one queſtions but that the clergy opened the bible before Charlemain's time, and preached the gifts and offerings of the Leviticus. But I dare ſay,

(a) Law of the Lombards, book iii. tit. 3. §. 1. & 2.

(b) *Canone 5. ex toma 1. conciliorum antiquorum Galliæ, operâ Jacobi Sirmundi.*

* In the civil wars which broke out at the time of Charles Martel, the lands belonging to the church of Rheims were given away to laymen; *the clergy were left to ſhift as well as they could*, ſays the life of St. Remigius, Surius, tom. i. pag. 279.

† It is that on which I have deſcanted in the 4th chapter of this book, and is to be found in Baluzius's edition of the capitularies, tom. i. art. 11. pag. 9.

‖ *Agraria & paſcuaria, vel decimas porcorum, eccleſiæ concedimus, ita ut actor aut decimator in rebus eccleſiæ nullus accedat.* The capitulary of Charlemain in the year 800. Baluzius's edition, pag. 336. explains extremely well what is meant by that ſort of tythe from which the church is exempted by Clotharius; it was the tythe of the hogs which were put into the king's foreſts to fatten; and Charlemain enjoyns his judges to pay it, as well as other people, in order to ſet an example: 'tis plain, that this was a right of ſeignory or œconomy.

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that before that prince's reign, tho' the tithes might have been preached up, yet they were never eſtabliſhed.

I took notice that the regulations made under king Pepin had ſubjected thoſe who were ſeized of church-lands in fief, to the payment of tithes, and to the repairing of the churches. It was a great point to oblige by a law, whoſe juſtice could not be diſputed, the principal men of the nation to ſet the example.

Charlemain did more; and we find by the capitulary (a) *de Villis*, that he obliged his own domains to the payment of the tithes; this was ſtill a greater example.

(a) Art. 6. Baluzius's edition, pag. 332. it was given in the year 800.

But the common people are hardly capable of being induced by examples to give up their own intereſts. The ſynod of (b) Franckfort furniſhed them with a more cogent motive to pay the tithes. A capitulary was made in that ſynod, wherein it is ſaid, that in the laſt * famine the ears of corn were found empty, having been devoured by devils, and that the voices of thoſe infernal ſpirits had been heard, reproaching them with not having paid the tithes; in conſequence of which it was ordained that all thoſe who were ſeized of church-lands ſhould pay the tithes; and the next conſequence was, that the obligation was extended to all.

(b) Held under Charlemain, in the year 794.

Charlemain's project did not ſucceed at firſt; it ſeemed too heavy a burthen †. The payment of tithes among the Jews, was connected with the plan

* *Experimento enim didicimus, in anno quo illa valida fames irrepſit, ebullire vacuas annonas a dæmonibus devoratas, & voces exprobrationis auditas*, &c. Baluzius's edition, pag. 267. art. 23.

† See among the reſt the capitulary of Lewis the Pious, in the year 829. Baluzius's edition, pag. 663. againſt thoſe who to avoid paying tithes neglected to cultivate the lands, &c. art. 5. *Nonis quidem & decimis, unde & genitor noſter et nos frequenter in diverſis placitis admonitionem fecimus.*

plan of the foundation of their republic; but here the payment of tithes was a burthen quite independent of the other charges of the eſtabliſhment of the monarchy. We find by the regulations (a) added to the law of the Lombards, the difficulty there was in cauſing the tithes to be accepted by the civil laws; and how difficult it was to get them admitted by the eccleſiaſtic laws, we may eaſily judge from the different canons of the councils.

(a) Among others, that of Lotharius book iii. tit. 3. chap. 6.

The people conſented at length to pay the tithes, upon condition that they might have a power of redeeming them. This the conſtitution of Lewis the Pious (b), and that of the emperor Lotharius (c) his ſon, would not allow.

(b) In the year 829. art. 7. in Baluzius tom. i. pag. 663.

The laws of Charlemain, in regard to the eſtabliſhment of tithes, were a work of neceſſity; a work in which religion only, and no ſuperſtition, was concerned.

His famous diviſion of the tithes into four parts, for the repairing of the churches, for the poor, for the biſhop, and for the clergy, manifeſtly proves that he wanted to reſtore the church to that fixt and permanent ſtate which ſhe had loſt.

(c) In the law of the Lombards book iii. tit. 3. §. 8.

His will * ſhews that he was deſirous of repairing the miſchief done by his grandfather Charles Martel. He made three equal ſhares of his moveable goods; two of theſe he would have divided each into one and-twenty parts, for the one-and-twenty metropolitan churches of his empire; each part was to be ſubdivided between the metropolitan, and the ſuffragan biſhops. The remaining third he divided into four parts, one he gave to his children and grandchildren, another was added to the two thirds already given, and the other two were bequeathed to charitable uſes. It ſeems as if he looked upon the immenſe donation he was making to the church leſs as a religious act, than as a political diſtribution.

* It is a kind of codicil produced by Eginhard, and different from the will itſelf, which we find in Goldaſtus and Baluzius.

CHAP. XIII.

Of the elections of biſhops and abbots.

Book XXXI. Chap. 13. & 14.

AS the churches were become poor, the kings reſigned the right of (a) nominating to biſhopricks and other eccleſiaſtic benefices. Princes gave themſelves leſs trouble about nominating the miniſters the church, and the candidates were leſs ſollicitous in applying to their authority. Thus the church received a kind of compenſation for the poſſeſſions ſhe had loſt.

Hence if Lewis the Pious * left the people of Rome in poſſeſſion of the right of chuſing their popes, it was owing to the general ſpirit that prevailed in his time: he behaved in reſpect to the ſee of Rome the ſame as to other biſhopricks.

(a) See the capitulary of Charlemain in year 803. art. 2. Baluzius's edition, pag. 379. and the edict of Lewis the Pious, in the year 834, in Goldaſt. Conſtit. Imperial. tom. i.

CHAP. XIV.

Of the fiefs of Charles Martel.

I Shall not pretend to determine whether Charles Martel in giving the church-lands in fief, made a grant of them for life, or in perpetuity. All I know is, that under Charlemain†, and Lotharius I‖. there were poſſeſſions of this kind which deſcended to the next heirs, and were divided amongſt them.

I find moreover that one part of them § was given as *allodia*, and the other as fiefs.

I took

* This is mentioned in the famous canon, *ego Ludovicus*, which is viſibly ſuppoſitious; it is in Baluzius's edition, pag. 591. in the year 817.

† As appears by his capitulary, in the year 801, art. 17. in Baluzius, tom. i. pag. 360.

‖ See his conſtitution inſerted in the code of the Lombards, book iii. tit. 1. §. 44.

§ See the above conſtitution, and the capitulary, of Charles the Bald, in the year 846. chap. 20. *in Villa Sparnaco*, Baluzius's edition, tom. 2. pag. 31. and that of the year 853. chap. 3. & 5. in the ſynod of Soiſſons, Baluzius's edition, tom. ii. pag.

I have taken notice that the proprietors of the allodia were ſubject to the ſervice all the ſame as the poſſeſſors of the fiefs. This, without doubt, was partly the reaſon that Charles Martel made grants of allodial lands as well as of fiefs. Book XXXI. Chap. 15. & 16.

CHAP. XV.

The ſame ſubject continued.

WE muſt obſerve, that the fiefs having been changed into church-lands, and theſe again into fiefs, they both borrowed ſomething of one another's nature. Thus the church-lands had the privileges of fiefs, and theſe had the privileges of church-lands: Such were the *honorifical rights of the churches, eſtabliſhed in thoſe days.

CHAP. XVI.

Confuſion of the royalty and mayoralty. The ſecond race.

THE order of my ſubject has made me break through the order of time, ſo as to ſpeak of Charlemain, before I had made mention of the famous epocha of the tranſlation of the crown to the Carlovingians under king Pepin, a revolution which, contrary to the nature of common events, is more remarked perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The title of king was hereditary, and that of mayor elective. Though the mayors in the

pag. 54. and that of the year 854. apud Attiniacum, chap. 10. Baluzius's edition, tom. ii. pag. 70. See alſo the firſt capitulary of Charlemain, *incerti anni*, art. 49. & 56. Baluzius's edition, tom. i. pag. 519.

* See the capitularies, book 5. art. 44. and the edict of Piſtes in the year 869. art. 8. & 9. where we find the honorifical rights of the lords eſtabliſhed, in the ſame manner as they are at this very day.

BOOK XXXI. Chap. 16.

latter times ſet whom they pleaſed of the Merovingians on the throne, they had not yet taken a king of another race; and the ancient law which fixed the crown in a particular family, was not yet effaced out of the hearts of the Franks. The king's perſon was almoſt unknown in the monarchy; but the royalty was well known. Pepin, ſon of Charles Martel, thought it would be proper to confound thoſe two titles, a confuſion which would leave it a moot point, whether the new royalty was hereditary or not; and this was ſufficient for him, who to the regal dignity had joined a great power. The mayor's authority was then blended with that of the king. In the mixture of theſe two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary: the crown at the beginning of the ſecond race was elective, becauſe the people choſe; it was hereditary, becauſe they always choſe in the ſame family *.

Father le Cointe, in oppoſition to the authority of all ancient records (a), denies † that the pope authorized this great change; and one of his reaſons is, that he would have committed an injuſtice. A fine thing to ſee an hiſtorian judge of what men have done, by what they ought to have done! at this rate we ſhould have no hiſtory at all.

(a) The anonymous chron. in the year 752. and the Chronic. Centul. in the year 754.

Be that as it will, 'tis very certain that immediately after duke Pepin's victory, the Merovingians ceaſed to be the reigning family. When his grandſon Pepin was crowned king, it was only a ceremony the more, and a phantom the leſs; he acquired nothing

* See the will of Charlemain, and the diviſion which Lewis the Pious made to his children in the aſſembly of the ſtates held at Quierzy, produced by Goldaſt, *quem populus eligere velit, ut patri ſuo ſuccedat in regni hereditate.*

† *Fabella quæ poſt Pippini mortem excogitata eſt, æquitati at ſanctitati Zachariæ papæ plurimum adverſatur.* . . . . . Eccleſiaſtic annals of the French, tom. ii. pag. 319.

nothing thereby but the royal ornaments, there was no change made in the nation.

This I have ſaid, in order to fix the moment of the revolution, to the end that we may not be miſtaken in looking upon that as a revolution which was only a conſequence of it.

When Hugh Capet was crowned king at the beginning of the third race, there was a much greater change, becauſe the kingdom paſſed from a ſtate of anarchy to ſome kind of a government; but when Pepin aſcended the throne, there was only a tranſition from one government to another of the ſame nature.

When Pepin was crowned king there was only a change of name; but when Hugh Capet was crowned, there was a change in the nature of the thing, becauſe by uniting a great fief to the crown the anarchy ceaſed.

When Pepin was crowned, the title of king was united to the higheſt office; when Hugh Capet was crowned, it was united to the greateſt fief.

CHAP. XVII.

A particular thing in the election of the kings of the ſecond race.

WE find by the formulary (a) of Pepin's conſecration, that Charles and Carloman were alſo anointed and bleſſed; and that the French nobility bound themſelves, on pain of interdiction and excommunication, never to chuſe a prince * of another family.

(a) Vol. 5th of the hiſtorians of France, by the Benedictins, pag. 9.

It appears by the wills of Charlemain and Lewis the Pious, that the Franks made a choice among the king's children; which agrees with the above-mentioned clauſe. And when the empire was tranſferred from Charlemain's family, the election, which before

* *Ut nunquam de alterius lumbis regem in ævo præſumant eligere, ſed ex ipſorum.* Vol. 5th of the hiſtorians of France, pag. 10.

before had been conditional, became ſimple and abſolute, and the ancient conſtitution was altered.

Pepin perceiving himſelf near his end, aſſembled (a) the lords both temporal and ſpiritual at St. Denis, and divided his kingdom between his two ſons Charles and Carloman. We have not the acts of this aſſembly; but we find what was there tranſacted, in the author of the ancient hiſtorical collection, publiſhed by Caniſius, and in (b) the writer of the annals of Metz, according to (c) the obſervation of Baluzius. Here I meet with two things in ſome meaſure contradictory; that he made this diviſion with the conſent of the nobility, and afterwards that he made it by his paternal authority. This proves what I ſaid, that the people's right in the ſecond race was to chuſe in the ſame family; it was, properly ſpeaking, rather a right of excluſion, than that of election.

(a) In the year 768.

(b) Tom. ii. lectionis antiquæ.

(c) Edition of the capitularies, tom. i. pag. 188.

This kind of elective right is confirmed by the monuments of the ſecond race. Such is this capitulary of the diviſion of the empire made by Charlemain among his three children, in which after ſettling their diviſion, he ſays (d) "*That if one of the "three brothers happens to have a ſon, ſuch as the "people ſhall be willing to chuſe as a fit perſon to "ſucceed to his father's kingdom, his uncles ſhall "conſent to it.*"

(d) In the 1ſt capitulary of the year 806. Baluzius's edition, pag. 439. art. 5.

This ſame regulation is to be met with in the diviſion (e), which Lewis the Pious made among his three children, Pepin, Lewis, and Charles, in the year 837. at the aſſembly of Aix la Chapelle; and likewiſe in another * diviſion, made twenty years before, by the ſame emperor, between Lotharius, Pepin, and Lewis. We may likewiſe ſee the oath which

(e) In Goldaſt. Imperial. Conſtitut. tom. ii. pag. 19.

* Baluzius's edition, pag. 574. art. 14. *Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos poteſtas ipſa dividatur, ſed potius populus pariter conveniens, unum ex eis quem dominum voluerit eligat; & hunc ſenior frater in loco fratris & filii ſuſcipiat.*

which Lewis the Stammerer took at Compiegne, at his coronation. *I Lewis, by the divine mercy and the people's election* (a) *appointed king, do promiſe* . . . . . What I ſay is confirmed by the acts of the council of Valence (b) held in the year 890. for the election of Lewis ſon of Boſon to the kingdom of Arles. Lewis was there elected, and the principal reaſon they give for chuſing him is, that he was of the imperial family *, that Charles the Fat had conferred upon him the dignity of king, and that the emperor Arnold had inveſted him by the ſcepter, and by the miniſtry of his ambaſſadors. The kingdom of Arles, like the other diſmembered or dependent kingdoms of Charlemain, was elective and hereditary.

(a) Capitulary of the year 877. Baluzius's edition, pag. 272.

(b) In father Labbe's councils, tom. ix. col. 424. and in Dumont's Corp. Diplomati. tom. i. art. 36.

CHAP. XVIII.

Charlemain.

CHarlemain's attention was to reſtrain the power of the nobility within proper bounds, and to hinder them from oppreſſing the freemen and the clergy. He balanced the ſeveral orders of the ſtate, and remained perfect maſter of them all. The whole was united by the ſtrength of his genius. He led the nobility continually from one expedition to another; giving them no time to form deſigns of their own, but employing them entirely in following his. The empire was ſupported by the greatneſs of its chief: the prince was great, but the man was greater. The prince's children were his firſt ſubjects, the inſtruments of his power, and the models of obedience. He made admirable regulations; and what was ſtill more admirable, he took care to ſee them executed. His genius diffuſed itſelf thro' every part of the empire. We find in this prince's laws a ſpirit of forecaſt and ſagacity that comprizes every thing, and a certain force that makes every thing

* By the mother's ſide.

Book XXXI. Chap. 18.

thing give way. All pretexts (a), for evading the performance of duties are removed, neglects are corrected, abuſes reformed or prevented. He knew how to puniſh, but he underſtood much better how to pardon. He was great in his deſigns, and ſimple in the execution. No prince was ever poſſeſſed in a higher degree of the art of performing the greateſt things with eaſe, and the moſt difficult with expedition. He was continually traverſing the ſeveral parts of his vaſt empire, and made them feel the weight of his hand wherever he fell. New difficulties ſprung up on every ſide, and on every ſide he removed them. Never prince had more reſolution in facing dangers; never prince knew better how to eſcape them. He mocked all manner of perils, and particularly thoſe to which great conquerors are generally ſubject, namely conſpiracies. This ſurpriſing prince was extremely moderate, of a very mild character, and of a plain ſimple behaviour. He loved to converſe freely with the lords of his court. He gave way perhaps too much to his paſſion for the fair ſex; a failing however which in a prince who always governed by himſelf, and who ſpent his life in a continual ſucceſſion of toils, may merit ſome indulgence. He was wonderfully exact in his expences; adminiſtering his domains with prudence, attention, and œconomy. A father (b) might learn from his laws how to govern his family; and we find in his capitularies the pure and ſacred ſource from whence he derived his riches. I ſhall add only one word more: he gave orders that * the eggs of his domains and the ſuperfluous herbs of his gardens ſhould be ſold; a moſt wonderful œconomy in a prince, who had diſtributed among his people all the riches of the Lombards, and the immenſe treaſures of thoſe Huns who had plundered the univerſe.

(a) See his 3d capitulary of the year 811. pag. 486. art. 1, 2, 3, 4, 5, 6, 7, & 8. and the 1ſt capitulary of the year 812. pag. 490. art. 1. and the capitulary of the year 812. pag. 494. art. 9. & 11. and others.

(b) See the capitulary *de Villis* in the year 800. his 2d capitulary of the year 813. art. 6. & 19. and the 5th book of the capitularies, art. 303.

CHAP.

* Capitul. *de Villis*, art. 39. See this whole capitulary, which is a maſter-piece of prudence, good adminiſtration and œconomy

CHAP. XIX.
The ſame ſubject continued.

THIS great prince was afraid leſt thoſe whom he intruſted in diſtant parts with the command, ſhould be inclined to revolt; and thought he ſhould find more docility among the clergy. For this reaſon he erected a great number of biſhopricks in Germany (a), and endowed them with very large fiefs. It appears by ſome charters, that the clauſes containing the prerogatives of thoſe fiefs, were not different from thoſe which were commonly inſerted in thoſe grants *; tho' at preſent we find the principal eccleſiaſtics of Germany inveſted with a ſovereign power. Be that as it will, theſe were ſome of the contrivances he uſed againſt the Saxons. That which he could not expect from the indolence and ſupineneſs of a vaſſal, he thought he might promiſe himſelf from the ſedulous attention of a biſhop. Beſides, a vaſſal of that kind, far from making uſe of the conquered people againſt him, would rather ſtand in need of his aſſiſtance to ſupport himſelf againſt his people.

Book XXXI. Chap. 19. & 20.

(a) See among others the foundation of the archbiſhoprick of Bremen in the capitulary of the year 789. Baluzius's edition, pag. 245.

CHAP. XX.
The ſucceſſors of Charlemain.

WHEN Auguſtus Cæſar was in Egypt, he ordered Alexander's tomb to be opened; and upon their aſking him whether he was willing they ſhould open the tombs of the Ptolemies, he anſwered that he wanted to ſee the king, and not the dead. Thus, in the hiſtory of the ſecond race, we are continually looking for Pepin and Charlemain; we want to ſee the kings and not the dead.

A

* For inſtance, the prohibition to the king's judges againſt entering upon the territory to demand the *freda*, and other duties. I have ſaid a good deal concerning this in the preceding book.

Book XXXI. Chap. 20.

A prince who was the ſport of his paſſions, and a dupe even to his virtues; a prince who never underſtood rightly neither his own ſtrength nor weakneſs; a prince who was incapable of making himſelf either feared or loved; a prince, in fine, who with few vices in his heart, had all manner of defects in his underſtanding, took the reins of the empire into his hand which had been held by Charlemain.

Lewis the Pious mixing all the indulgence of an old huſband, with all the weakneſs of an old king, threw his family into a diſorder, which was followed with the downfal of the monarchy. He was continually altering the diviſions he had made among his children. And yet theſe diviſions had been confirmed each in their turn by his own oath, and by thoſe of his children and the nobility. This was as if he wanted to try the fidelity of his ſubjects; it was endeavouring by confuſion, ſcruples, and equivocation to puzzle their obedience; it was confounding the different rights of thoſe princes, and rendering their titles dubious, eſpecially at a time when there were but few ſtrong holds, and when the principal bulwark of authority was the fealty ſworn and accepted.

The emperor's children, in order to preſerve their diviſions, courted the clergy, and granted them privileges till then unheard. Theſe privileges were ſpecious; the clergy were induced to warrant a thing which thoſe princes would have been glad they had authoriſed. Agobard (a) repreſents to Lewis the Pious, his having ſent Lotharius to Rome, in order to have him declared emperor; and that he had made a diviſion of his dominions among his children, after having conſulted heaven by three days faſting and praying. What defence could a ſuperſtitious prince make againſt the attack of ſuperſtition? 'Tis eaſy to perceive what a ſhock the ſupreme authority muſt have twice received from the impriſonment of this prince, and from his public penance;

(a) See his letters.

penance; they wanted to degrade the king, and they degraded his authority.

CHAP. XXI.

The ſame ſubject continued.

THE ſtrength which the nation had derived from Charlemain, laſted well enough under Lewis the Pious, to enable the ſtate to ſupport its grandeur, and to command reſpect from ſtrangers. The prince's underſtanding was weak, but the nation was warlike. The royal authority declined within, though there ſeemed to be no diminution of power without.

Charlemain, his father, and his grandfather, were ſucceſſive rulers of the monarchy. The firſt flattered the avarice of the ſoldiers; the other two that of the clergy; and the children of Lewis the Pious excited the ambition of both.

In the French conſtitution, the whole power of the ſtate was lodged in the hands of the king, the nobility, and clergy. Charles Martel, Pepin, and Charlemain, joined ſometimes their intereſt with one of thoſe parties to check the other, and generally with both: but the children of Lewis the Pious disjoined both thoſe bodies from the king, by which means the royal authority was too greatly debilitated.

CHAP. XXII.

The ſame ſubject continued.

THE clergy had reaſon to repent the protection they had granted to Lewis the Pious's children. This prince, as I have already obſerved, had never given (a) any *preceptions* of the church-lands to the laity; but it was not long before Lotharius in Italy, and Pepin in Aquitaine, quitted Charlemain's plan, and reſumed that of Charles Martel.

(a) See what the biſhops ſay in the ſynod of the year, 845. *apud Teudonis villam*, art.

Martel. The clergy had recourſe to the emperor againſt his children, but they themſelves had weakened the authority they ſued. In Aquitaine ſome condeſcenſion was ſhewn, but none in Italy.

The civil wars with which the life of Lewis the Pious had been embroiled, were the ſeed of thoſe which followed his death. The three brothers Lotharius, Lewis, and Charles, endeavoured each to bring over the nobility to their party. To thoſe therefore who were willing to follow them they granted *preceptions* of the church-lands; ſo that to gain the nobility, they ſacrificed the clergy.

We find in the capitularies *, that thoſe princes were obliged to yield to the importunity of ſo many demands, and that what they would not often have freely granted, was extorted from them: we ſee that the clergy thought themſelves more oppreſſed by the nobility than by the kings. It appears alſo, that Charles the Bald † became the greateſt enemy of the patrimony of the clergy, whether he was moſt incenſed againſt them for having degraded his father on their account, or whether he was the moſt timorous. Be it as it will, we meet with ‖ continual quarrels

* See the ſynod in the year 845. *apud Teudonis villam*, art. 3. & 4. which gives a very exact deſcription of things; as alſo, that of the ſame year, held at the palace of *Vernes*, art. 12. and the ſynod of Beauvais alſo in the ſame year, art. 3, 4, & 6, and the capitulary in *Villa Sparnaco*, in the year 846. art. 20. and the letter which the biſhops aſſembled at Rheims wrote in 858. to Lewis king of Germany 8.

† See the capitulary *in Villa Sparnaco*, in the year 846. The nobility had ſet the king againſt the biſhops, inſomuch that he expelled them from the aſſembly; ſome canons of the ſynods were picked out, and they were told that theſe were the only ones which ſhould be obſerved; nothing was granted them but what was impoſſible to be refuſed. See art. 20, 21, & 22. See alſo the letter which the biſhops aſſembled at Rheims wrote in the year 858. to Lewis king of Germany, and the edict of Piſtes, in the year 864. art. 5.

‖ See this very capitulary in the year 846. in *Villa Sparnaco*. See alſo the capitulary of the aſſembly held *apud Marſnam*, in the

quarrels in the capitularies, between the clergy who demanded their lands, and the nobility who refuſed, evaded, or deferred to reſtore them; and the kings between both. Book XXXI. Chap. 22.

The ſituation of things at that time is a ſpectacle really deſerving of pity. While Lewis the Pious made immenſe donations out of his domains to the church; his children diſtributed the poſſeſſions of the clergy among the laity. The ſame hand which founded new abbies, often pulled down the old ones. The clergy had no fixt ſtate; one moment they were ſtripped, another they received ſatisfaction; but the crown was continually loſing.

Towards the cloſe of the reign of Charles the Bald, and from that time forward, there was an end of the diſputes of the clergy and laity, concerning the reſtitution of lands. The biſhops indeed breathed out ſtill a few ſighs, in their remonſtrances to Charles the Bald, which we find in the capitulary of the year 856, and in the letter (a) they wrote to Lewis king of Germany, in the year 858: but they propoſed things, and challenged promiſes ſo often in vain, that we plainly ſee they had no longer any hopes of obtaining their deſire.

(a) Art. 8.

All that could be expected then, was (b) to repair in general the injuries done both to church and ſtate. The kings engaged not to deprive their vaſſals of their freemen, and not to give away the church-lands

(b) See the capitulary of the year 852. art. 6. & 7.

the year 847. art. 4. wherein the clergy reduced themſelves to demand only the reſtitution of what they had been poſſeſſed of under Lewis the Pious. See alſo the capitulary of the year 851. *apud Marſnam*, art. 6. & 7. which confirms the nobility and clergy in their ſeveral poſſeſſions, and that *apud Bonoilum*, in the year 856, which is a remonſtrance of the biſhops to the king, becauſe the evils, after ſo many laws, had not been remedied; and, in fine, the letter which the biſhops aſſembled at Rheims wrote in the year 858. to Lewis king of Germany, art. 8.

Book XXXI. Chap. 22.

lands any more by *preceptions* * ; ſo that the intereſts of the clergy and nobility ſeemed then to be united.

The dreadful depredations of the Normans, as I have already obſerved, contributed greatly to put an end to thoſe quarrels.

The authority of the kings diminiſhing every day, both for the reaſons already given, and thoſe which I ſhall give hereafter, they thought they had no better reſource left, than to put themſelves in the hands of the Clergy. But the clergy had weakened the power of the kings, and the kings had weakened the influence of the clergy.

In vain did Charles the Bald and his ſucceſſors call in the church to ſupport the ſtate, and to prevent its fall ; in vain did they avail themſelves of the † reſpect the people had for that body, to maintain that which they ſhould have alſo for their prince; in vain did they endeavour (a) to give an authority to their laws by that of the canons ; in vain did they join the eccleſiaſtic (b) with the civil puniſhments ; in vain to counterbalance the authority of the Count, (c) did they give to each biſhop the title of their commiſſary in the ſeveral provinces : it was impoſſible for the clergy to repair the miſchief they had done ; and a terrible misfortune, of which I ſhall ſpeak anon, tumbled the crown to the ground.

(a) See the capitulary of Charles the Bald, de Cariſiaco, in the year 857. Baluzius's edition, tom. ii. pag. 88. art. 1, 2, 3, 4, & 7.

(b) See the ſynod of Piſtes in the year 862. art. 4. and the capitulary of Carloman and of Lewis II. *apud Vernis palatium*, in the year 883. art. 4. & 5.

(c) Capitulary of the year 876. under Charles the Bald, in Synodo Pontigonenſi. Baluzius's edition, art. 12.

CHAP.

*Charles the Bald, in the ſynod of Soiſons, ſays, *that he had promiſed the biſhops not to give any more preceptions of church-lands.* Capitularies of the year 853. art. 11. Baluzius's edition, tom. ii. pag. 56.

† See the capitulary of Charles the Bald, apud Saponarias, in the year 859. art. 3. Venilon, whom I made archbiſhop of Sens, has conſecrated me ; and I ought not to be expelled the kingdom by any body, *Saltem ſine audientia & judicio epiſcoporum, quorum miniſterio in regem ſum conſecratus, et qui throni Dei ſunt dicti, in quibus Deus ſedet & per quos ſua decernit judicia, quorum paternis correctionibus & caſtigatoriis judiciis me ſubdere fui paratus, & in preſentî ſum ſubditus.*

CHAP. XXIII.

That the freemen were rendered capable of holding fiefs.

I Said that the freemen were led againſt the enemy by their count, and the vaſſals by their lord. This was the reaſon that the ſeveral orders of the ſtate balanced each other; and tho' the king's vaſſals had other vaſſals under them, yet they might be over-awed by the count, who was at the head of all the freemen of the monarchy. Book XXXI. Chap. 23.

The freemen (a) were not allowed at firſt to vow fealty for a fief; but in proceſs of time this was permitted: and I find that this change was made during the time that elapſed from the reign of Gontram to that of Charlemain. This I prove by the compariſon that may be drawn between the treaty of Andely (b), ſigned by Gontram, Childebert, and queen Brunechild, and the * diviſion made by Charlemain amongſt his children, as well as a like diviſion made by Lewis the Pious. Theſe three acts contain pretty near the ſame regulations, with regard to the vaſſals; and as they regulate the very ſame points, under almoſt the ſame circumſtances, the ſpirit as well as the letter of thoſe three treaties are very near the ſame in this reſpect.

(a) See what has been ſaid already, book xxx. laſt chapter towards the end.

(b) In the year 587. in Gregory of Tours, book ix.

But as to what concerns the freemen, there is a capital difference. The treaty of Andely does not ſay that they might vow fealty for a fief, whereas we find in the diviſions of Charlemain and Lewis the Pious, expreſs clauſes to impower them to vow fealty. This ſhews that a new uſage had been introduced after the treaty of Andely, whereby the freemen were become capable of this great prerogative.

* See the following chapter where I ſhall ſpeak more diffuſively of thoſe diviſions, and the notes where they are quoted.

This must have happened when Charles Martel after distributing the church-lands to his soldiers, and giving them partly in fief, and partly as *allodia*, made a kind of revolution in the feudal laws. 'Tis, very probable, that the nobility who were seized already of fiefs, found a great advantage in receiveing the new grants as *allodia*, and that the freemen found themselves happier in accepting them as fiefs.

CHAP. XXIV.

The principal cause of the humiliation of the second race. Changes in the allodia.

CHarlemain in the division ([a]) mentioned in the preceding chapter, ordained, that after his death the vassals belonging to each king should be permitted to receive benefices in their own princes dominions, and not in those ([b]) of another; whereas they * might keep their allodial estates in any of their dominions. But he adds † that every freeman might after the death of his lord, vow fealty in any of the three kingdoms to whom he pleased, as well as he that had never had a lord. We find the same regulations in the division which Lewis the Pious made among his children in the year 817.

But tho' the freemen had vowed fealty for a fief, yet the count's militia was not thereby weakened; the freeman was still obliged to contribute for his *allodium*, and to get people ready for the service belonging to it, at the proportion of one man to four manors; or else to procure a man that should serve the fief in his stead. And when some abuses had been introduced

(a) In the year 806. between Charles, Pepin and Lewis; it is quoted by Goldast, and by Baluzius, tom. i. p. 439.

([b]) Art. 9. pag. 443. which is agreeable to the treaty of Andely in Gregory of Tours, book ix.

* Art. 10. and there is no mention made of this in the treaty of Andely.

† In Baluzius, tom. i. pag. 574. *Licentiam habeat unusquisque liber homo qui seniorem non habuerit, cuicumque ex his tribus fratribus voluerit se commendandi*, art. 9. See also the division made by the same emperor in the year 837. art. 6. Baluzius's edition, pag. 686.

introduced upon this head, they were redreſſed, as appears by the conſtitutions * of Charlemain, and by that (a) of Pepin king of Italy, which explain each other.

The remark make by hiſtorians, that the battle of Fontenay was the ruin of the monarchy, is very true; but I beg leave to caſt an eye on the unhappy conſequences of that day.

Some time after that battle the three brothers Lotharius, Lewis and Charles made a treaty (b), wherein I find ſome clauſes which muſt have altered the whole political ſyſtem of the French Government.

In the declaration * which Charles made to the people of that part of the treaty relating to them he ſays, that †every freeman might chuſe whom he pleaſed for his lord, whether the king or any of the nobility. Before this treaty the freeman might vow fealty for a fief; but his *allodium* ſtill continued under the immediate power of the king, that is, under the count's juriſdiction; and he depended on the lord to whom he had vowed fealty, only on account of the fief which he had obtained. After that treaty every freeman had a right to ſubject his *allodium* to the king, or to any other lord as he thought proper. The queſtion is not concerning thoſe who put themſelves under the protection of another for a fief, but about thoſe who changed their *allodium* into a fief, and withdrew themſelves, as it were, from the civil juriſdiction, to enter under the feudal

(a) In the year 793. inſerted in the law of the Lombards, book iii. tit. 9. chap. 9.

(b) In the year 847. quoted by *Aubert Lemire*, and Baluzius, tom. ii. p 42. *Conventus apud Marſnam.*

*In the year 811. Baluzius's edition, tom. i. pag. 486. art. 7. & 8. and that of the year 812. ibid pag. 490. art. 1. *Ut omnis liber homo qui quatuor manſos veſtitos de proprio ſuo, ſive de alicujus beneficio habet, ipſe ſe præparet & ipſe in hoſtem pergat, ſive cum ſeniore ſuo*, &c. See alſo the capitulary of the year 807. Baluzius's edition, tom. i. pag. 458.

†*Adnunciatio.*

§*Ut unuſquiſque liber homo in noſtro regno ſeniorem quem voluerit in nobis & in noſtris fidelibus accipiat*, art. 2. of the declaration of Charles.

Book XXXI. Chap. 24.

power of the king, or of the lord whom they thought fit to chuſe.

Thus it was that thoſe who formerly were only under the king's power, as freemen under the count, became inſenſibly vaſſals one of another, ſince every freeman might chuſe whom he pleaſed for his lord, the king or any of the nobility.

2. If a man changed an eſtate which he poſſeſſed in perpetuity, into a fief, this new fief could no longer be only for life. Hence we ſee, a ſhort time after, a *general law for giving the fiefs to the children of the preſent poſſeſſor: it was made by Charles the Bald, one of the three contracting princes.

What has been ſaid concerning the liberty every freeman had in the monarchy, after the treaty of the three brothers, of chuſing whom he pleaſed for his lord, the king or any of the nobility, is confirmed by the acts ſubſequent to that time.

In the reign † of Charlemain, when a vaſſal had received a thing of a lord, were it worth only a ſol, he could not afterwards quit him. But, under Charles the Bald, the vaſſals ‖ might follow their intereſts or their caprice with impunity; and this prince explains himſelf ſo ſtrongly on this ſubject, that he ſeems rather to encourage them to enjoy this liberty, than to reſtrain it. In Charlemain's time, benefices were

* Capitulary of the year 877. tit. 53. art. 9, & 10. apud Carifiacum, *ſimiliter & de noſtris vaſſallis faciendum eſt*, &c. This capitulary relates to another of the ſame year, and of the ſame place, art. 3.

† Capitulary of Aix la Chapelle, in the year 813, art. 16. *quod nullus ſeniorem ſuum dimittat, poſtquam ab eo acceperit valente ſolidum unum*; and the capitulary of Pepin, in the year 783. art. 5.

‖ See the capitulary *de Carifiaco*, in the year 856. art. 10. & 13. Baluzius's edition, tom. ii. pag. 83. in which the king, together with the lords ſpiritual and temporal, agreed to this, *Et ſi aliquis de vobis ſit cui ſuus ſenioratus non placet, & illi ſimulat ad alium ſeniorem melius quam ad illum acaptare poſſit, veniat ad illum, & ipſe, tranquille & pacifico animo donat illi commeatum - - - - & quod Deus illi cupierit ad alium ſeniorem acaptare potuerit, pacificè habeat.*

were rather perſonal than real; afterwards they became rather real than perſonal.

CHAP. XXV.

Changes in the fiefs.

THE ſame changes happened in the fiefs, as in the *allodia*. We find by the capitulary (a) of Compiegne, under king Pepin, that thoſe who had received a benefice from the king, gave a part of this benefice to different vaſſals; but theſe parts were not diſtinct from the whole. The king revoked them when he revoked the whole; and at the death of the king's vaſſal, the rear-vaſſal loſt alſo his rear-fief; and a new beneficiary ſucceeded, who likewiſe eſtabliſhed new rear-vaſſals. Thus it was the perſon, and not the rear-fief, that depended on the fief; on the one hand, the rear-vaſſal returned to the king, becauſe he was not tied for ever to the vaſſal; and the rear-fief returned alſo to the king, becauſe it was the fief itſelf, and not a dependance of it.

(a) In the year 757. art. 6. Baluzius's edition, pag. 181.

Such was the rear vaſſalage, while the fiefs were during pleaſure; and ſuch was it alſo, while they were for life. This was altered when the fiefs deſcended to the next heirs, and the rear-fiefs the ſame. That which was held before immediately of the king, was held now mediately; and the regal power was thrown back, as it were, one degree; ſometimes two, and oftentimes more.

We find in the books (b) of the fiefs, that tho' the king's vaſſals might give away in fief, that is, in rear-fief to the king, yet theſe rear-vaſſals or petty vavaſors could not give alſo in fief; ſo that whatever they had given, they might always reſume. Beſides, a grant of that kind did not deſcend to the children like the fiefs, becauſe it was not ſuppoſed to have been made according to the law of the fiefs.

(b) Book i. chap. 1.

Book XXXI. Chap. 26.

If we compare the ſituation in which the rear-vaſſalage was at the time when the two Milaneſe ſenators wrote that book, to what it was under king Pepin, we ſhall find that the rear-fiefs preſerved * their primitive nature longer than the fiefs.

But when thoſe ſenators wrote, ſuch general exceptions had been made to this rule, as had almoſt aboliſhed it. For if a perſon (a) who had received a fief of a rear-vaſſal, happened to follow him upon any expedition to Rome, he was intitled to all the privileges of a vaſſal. In like manner, if he had given money to the rear-vaſſal to obtain the fief, the latter could not take it from him, nor tranſmit it to his ſon, till he returned him his money: in fine, this rule (b) was no longer obſerved in the ſenate of Milan.

(a) Book i. of fiefs, chap. 1.

(b) Ibid.

CHAP. XXVI.

Another change which happened in the fiefs.

IN Charlemain's time (c), they were obliged under great penalties, to repair to the general meeting in caſe of any war whatſoever; they admitted of no excuſes, and if the count exempted any one, he was liable himſelf to be puniſhed. But the treaty of the three brothers (d), made a reſtriction * upon this head, which reſcued the nobility, as it were, out of the king's hands; they were no longer obliged to ſerve in time of war, but when the war was defenſive. In others, they were at liberty to follow their lord, or to mind their buſineſs.

(c) Capitulary of the year 802. art. 7. Baluzius's edition, pag. 365.

(d) Apud Marſnam, in the year 847. Baluzius's edition, pag. 42.

The death of an hundred thouſand French, at the battle of Fontenay, made the few remains of the nobility imagine, that by the private quarrels of their

* At leaſt in Italy and Germany.

† *Volumus ut cujuſcumque noſtrum homo, in cujuſcumque regno ſit, cum ſeniore ſuo in hoſtem, vel aliis ſuis utilitatibus pergat, niſi talis regni invaſio quam* LAMTUVERI *dicunt, quod abſit, acciderit, ut omnis populus illius regni ad eam repellendam communiter pergat*, art. 5. ibid. pag. 44.

their kings, about their reſpective ſhares, they ſhould be utterly exterminated, and that their ambition and jealouſy would cauſe the effuſion of what little blood was left. A law was therefore paſſed, that the nobility ſhould not be obliged to ſerve their princes in the wars, unleſs it was to defend the ſtate againſt a foreign invaſion. This law (a) obtained for ſeveral ages.

(a) See the law of Guy king of the Romans among thoſe which were added to the Salic law, and to that of the Lombards tit. 6. §. 2. in *Echard.*

CHAP. XXVII.

Changes which happened in the great offices, and in the fiefs.

EVery thing ſeemed to be infected with a particular vice, and to be corrupted at one and the ſame time. I took notice, that in the beginning ſeveral fiefs had been alienated in perpetuity; but thoſe were particular caſes, and the fiefs in general preſerved their nature; ſo that if the crown loſt ſome fiefs, ſhe had ſubſtituted others in their ſtead. I likewiſe took notice, that the crown had never alienated the great offices in perpetuity *.

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained in his capitularies, that the (a) counties ſhould be given to the count's children, and that this regulation ſhould alſo take place in reſpect to the fiefs.

(b) See his capitulary of the year 877. tit. 53. art. 9. & 10. *apud Cariſiacum*; this capitulary is relative to another of the ſame year and place, art. 3.

We ſhall ſee preſently that this regulation received a much greater extent, inſomuch that the great offices and fiefs went even to more diſtant relations. From thence it followed, that the greateſt part of the lords, who held immediately of the crown, held now only mediately. Thoſe counts who formerly adminiſtered

* Some authors pretend, that the county of Toulouſe had been given by Charles Martel, and paſſed by inheritance down to Raymond the laſt count; but if this be true, it was owing to ſome circumſtances which might have been an inducement to chuſe the counts of Toulouſe from among the children of the laſt poſſeſſor.

adminiſtered juſtice in the king's *placita*; thoſe counts who led the freemen againſt the enemy, found themſelves ſituated between the king and his freemen; and the king's power was removed further off another degree.

Again, it appears by the capitularies (a), that the counts had benefices annexed to their counties and vaſſals under them. When the counties became hereditary, the count's vaſſals were no longer the immediate vaſſals of the king, the benefices annexed to the counties were no longer the king's benefices: the counts grew powerful, becauſe the vaſſals they had already under them enabled them to procure others.

In order to be convinced how much the monarchy was thereby weakened towards the end of the ſecond race, we have only to turn our eyes to what happened at the beginning of the third, when the multiplicity of rear-fiefs flung the great vaſſals into deſpair.

It was a cuſtom (b) of the kingdom, that when the elder brothers had given ſhares to their younger brothers, the latter paid homage to the elder; ſo that the reigning lord held them only as a rear-fief. Philip Auguſtus, the duke of Burgundy, the counts of Nevers, Boulogne, St. Paul, Dampierre, and other lords, declared (c) that henceforward, whether the fief was divided by ſucceſſion, or otherwiſe, the whole ſhould be held always of the ſame lord, without any intermediation. This ordinance was not generally followed; for as I have elſewhere obſerved, it was impoſſible to make general ordinances at that time; but many of our cuſtoms were regulated by them.

(a) The 3d capitulary of the year 812. art. 7. and that of the year 815. art. 6. on the Spaniards: The collection of the capitularies. book v. art. 228. and the capitulary of the year 869. art. 2. and that of the year 877. art. 13. Baluzius's edition.

(b) As appears from Otho of Friſingen, *of the actions of Frederic.* book ii. chap. 29.

(c) See the ordinance of Philip Auguſtus, in the year 1209. in the new collection.

CHAP.

CHAP. XXVIII.

Of the nature of the fiefs after the reign of Charles the Bald.

WE have obſerved, that Charles the Bald ordained, that when the poſſeſſor of a great office or of a fief, left a ſon at his death, the office or fief ſhould devolve to him. It would be a difficult matter to trace the progreſs of the abuſes which reſulted from thence, and of the extenſion given to that law in each country. I find in the books (a) of the fiefs, that towards the beginning of the reign of the emperor Conrad the II. the fiefs ſituated in his dominions did not deſcend to the grandchildren: they deſcended only to one of the laſt poſſeſſor's children *, who had been choſen by the lord: thus the fiefs were given by a kind of election, which the lord made among the children. Book XXXI. Chap. 28.

(a) Book i. tit. 1.

We have explained in the ſeventeenth chapter of this book, in what manner the crown was in ſome reſpects elective, and in others hereditary, under the ſecond race. It was hereditary, becauſe the kings were always taken from that family, and becauſe the children ſucceeded; it was elective, by reaſon the people choſe from amongſt the children. As things of a ſimilar nature move generally cloſe together, and one political law is conſtantly relative to another, the ſame ſpirit was followed † in the ſucceſſion of fiefs, as had been followed in the ſucceſſion to the crown. Thus the fiefs were tranſmitted to the children by the right of ſucceſſion, as well as of election; and each fief was become both elective and hereditary, like the crown.

This right of election in the perſon of the lord, was

* *Sic progreſſum eſt, ut ad filios deveniret in quem Dominus hoc vellet beneficium confirmare* ibid.

† At leaſt in Italy and Germany.

Book XXXI. Chap. 29

was not ſubſiſting * at the time of the authors (a) of the books of fiefs, that is, in the reign of the emperor Frederic I.

(a) Gerardus Niger and Aubertus de Orto.

CHAP. XXIX.

The ſame ſubject continued.

IT is mentioned in the books of the fiefs, that when † the emperor Conrad ſet out for Rome, the vaſſals in his ſervice preſented a petition to him, that he would pleaſe to make a law, that the fiefs which deſcended to the children, ſhould deſcend alſo to the grandchildren; and that he whoſe brother died without legitimate heirs, might ſucceed to the fief which had belonged to their common father: This was granted.

In the ſame place it is ſaid, (and we are to remember that thoſe writers ‖ lived at the time of the emperor Frederic I.) that the ancient civilians § had always been of opinion, that the ſucceſſion of fiefs in a collateral line did not extend further than to own-brothers; tho' of late it was carried as far as the ſeventh degree, as by the new code they had extended it in a direct line *in infinitum*. 'Tis thus that Conrad's law was inſenſibly extended.

All theſe things ſuppoſed, the bare reading of the hiſtory of France is ſufficient to ſhew, that the perpetuity of fiefs was eſtabliſhed earlier in France, than

* *Quod hodie ita ſtabilitum eſt, ut ad omnes æqualiter veniat.* book i. of the fiefs, tit. 1.

† *Cum verò Conradus Romam proficiſceretur, petitum eſt a fidelibus qui in ejus erant ſervitio, ut lege ab eo promulgata hoc etiam ad nepotes ex filio producere dignaretur; & ut frater fratri, ſine legitimo hærede defuncto, in beneficio quod eorum patris fuit, ſuccedat.* book i. of fiefs, tit. 1.

‖ Cujas has proved it extremely well.

§ *Sciendum eſt, quod beneficium advenientes ex latere ultra fratres patrueles non progreditur, ſucceſſione ab antiquis ſapientibus conſtitutum, licet moderno tempore uſque ad ſeptimum geniculum ſit uſurpatum, quod in maſculis deſcendentibus novo jure in infinitum extenditur.* ibid.

than in Germany. Towards the commencement of the reign of the emperor Conrad II. in 1024, things were upon the ſame footing ſtill in Germany, as they had been in France under the reign of Charles the Bald, who died in 877. But ſuch were the changes made in France after the reign of Charles the Bald, that Charles the ſimple found himſelf incapable of diſputing with a foreign houſe his inconteſtible rights to the empire; and, in fine, that in Hugh Capet's time, the reigning family, ſtripped of all its domains, was no longer able to maintain the crown.

The weak underſtanding of Charles the Bald produced an equal weakneſs in the French monarchy. But as Lewis king of Germany his Brother, and ſome of his ſucceſſors were men of better parts, their government preſerved its ſtrength much longer.

But what do I ſay? perhaps the flegmatic temper, and if I dare uſe the expreſſion, the immutability of ſpirit peculiar to the German nation, made a longer ſtand than that of the French nation, againſt this diſpoſition of things, which perpetuated the fiefs, by a natural tendency, in families.

Beſides, the kingdom of Germany was not laid waſte, and annihilated, as it were, like that of France, by that particular kind of war with which it had been harraſſed by the Normans and Saracens. There were leſs riches in Germany, fewer cities to plunder, leſs coaſts to ſcour, more marſhes to get over, more foreſts to penetrate. The princes who did not ſee every inſtant their dominions ready to fall to pieces, had leſs need of their vaſſals, and conſequently had leſs dependance on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make continual expeditions into Italy, the fiefs would have preſerved their primitive nature much longer in that country.

CHAP.

CHAP. XXX.

In what manner the empire was transferred from the family of Charlemain.

Book XXXI. Chap. 30, & 31.

THE empire, which in prejudice to the branch of Charles the Bald, had been already given to the * baſtard line of Lewis king of Germany, was transferred to a foreign houſe by the election of Conrad, duke of Franconia, in 912. The reigning branch in France, which was hardly capable of diſputing a few villages, was much leſs in a ſituation to diſpute the empire. We have an agreement which paſſed between Charles the Simple and the emperor Henry I. who had ſucceeded to Conrad. It is called the compact of Bonn(a). Theſe two princes met in a veſſel which had been placed in the middle of the Rhine, and ſwore eternal friendſhip. They uſed on this occaſion an excellent *middle term.* Charles took the title of king of Weſt France, and Henry that of king of Eaſt France. Charles contracted with the king of Germany, and not with the Emperor.

(a) In the year 926. quoted by Aubert le Mire, Cod. donationum piarum. chap. 27.

CHAP. XXXI.

In what manner the crown of France *was transferred to the Houſe of* Hugh Capet.

THE inheritance of the fiefs, and the general eſtabliſhment of rear fiefs, extinguiſhed the political, and formed a feudal government. Inſtead of that prodigious multitude of vaſſals who were formerly under the king, there were now a few only, on whom the others depended. The kings had ſcarce any longer a direct authority; a power which was to paſs through ſo many and through ſuch great powers, either ſtopt or was loſt before it reached its term. Thoſe great vaſſals would no longer obey; and

* Arnold, and his ſon Lewis IV.

and they even made uſe of their rear-vaſſals to withdraw their obedience. The kings deprived of their domains, and reduced to the cities of Rheims and Laon, were left expoſed to their mercy; the tree ſtretched out its branches too far, and the head was withered. The kingdom found itſelf without a domain, as the empire is at preſent. The crown was therefore given to one of the moſt potent vaſſals.

The Normans ravaged the kingdom; they came in a kind of boats or ſmall veſſels, entered the mouths of rivers, and laid the country waſte on both ſides. The cities of Orleans *and Paris put a ſtop to thoſe plunderers, ſo that they could not advance further, neither on the Seine, nor on the Loire. Hugh Capet, who was maſter of thoſe cities, held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only perſon able to defend it. 'Tis thus the empire was afterwards given to a family whoſe dominions form ſo ſtrong a barrier againſt the Turks.

The empire went from Charlemain's family, at a time when the inheritance of fiefs was eſtabliſhed only as a mere condeſcendance. It even appears that it obtained much later among the Germans than among the French; which was the reaſon that the empire, conſidered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemain, the fiefs were really hereditary in this kingdom; and the crown as a great fief was alſo hereditary.

But 'tis very wrong to refer to the very moment of this revolution, all the changes which had already happened, or happened afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great fief.

CHAP.

* See the capitulary of Charles the Bald, in the year 877, *apud Cariſiacum*, on the importance of Paris, St. Denis, and the caſtles on the Loire, in thoſe days.

CHAP. XXXII.

Some conſequences of the perpetuity of fiefs.

Book XXXI. Chap. 32.

FROM the perpetuity of the fiefs it followed, that the right of ſeniority or primogeniture was eſtabliſhed among the French. This right was quite unknown under the firſt race (a); the crown was divided among the brothers, the *allodia* were divided in the ſame manner, and as the fiefs whether precarious or for life were not an object of ſucceſſion, neither could they be of diviſion.

(a) See the Salic law, and the law of the Ripuarians in the title of *allodia*.

Under the ſecond race, the title of emperor which Lewis the Pious enjoyed, and with which he honoured his eldeſt ſon Lotharius, made him think of giving this prince a kind of ſuperiority over his younger brothers. The two kings * were obliged to wait upon the emperor every year, to carry him preſents and to receive much greater from him; they were to conſult with him upon common affairs. This is what inſpired Lotharius with thoſe pretences which met with ſuch bad ſucceſs. When Agobard † wrote in favour of this prince, he alledged the emperor's own regulation, who had aſſociated Lotharius to the empire, after he had conſulted the Almighty by a three days faſt, and by the celebration of the holy ſacrifices; after the nation had ſworn allegiance to him, which they could not refuſe without perjuring themſelves, and after he had ſent Lotharius to Rome to be confirmed by the pope. He lays a ſtreſs upon all this, and upon his right of primogeniture. He ſays indeed, that the emperor had deſigned a diviſion among the younger brothers, and that he had given the preference to the elder; but ſaying he had preferred the elder, was

* See the capitulary of the year 817, which contains the firſt diviſion made by Lewis the Pious among his children.

† See his two letters upon this ſubject, the title of one of which is *de diviſione imperii*.

was saying at the same time that he might have preferred his younger brothers.

But as soon as the fiefs were become hereditary, the right of seniority was established in the succession of the fiefs; and for the same reason in that of the crown which was the great fief. The ancient law of divisions was no longer subsisting; the fiefs being charged with a service, the possessor must have been enabled to discharge it. The right of primogeniture was established, and the reason of the feudal law forced that of the political or civil law.

As the fiefs descended to the children of the possessor, the lords lost the liberty of disposing of them; and in order to indemnify themselves on that account, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

The fiefs were soon rendered transferable to strangers, as a patrimonial estate. This gave rise to the right of fines of alienation, which were established almost throughout the whole kingdom. These rights were arbitrary in the beginning; but when the practice of granting these permissions was become general, they were fixed in every district.

The right of redemption was to be paid at each change of heir, and at first was paid even in a direct line (a). The most general custom had fixed it to one year's income. This was burthensome and inconvenient to the vassal, and affected in some measure the fief itself. It was often agreed * in the act of homage, that the lord should no longer demand more than a certain sum of money for the redemption,

(a) See the ordinance of Philip Augustus, in the year 1202. on the fiefs.

* We find several of these conventions in the charters, as in the register-book of Vendome, and that of the abbey of St. Cyprian in Poitou, of which Mr. Galland has given some extracts, pag. 55.

tion, which by the changes incident to money became afterwards of no manner of importance. Thus the right of redemption is in our days reduced almoſt to nothing, while that of the fines of alienation is continued in its full extent. As this right concerned neither the vaſſal nor his heirs, but was a fortuitous caſe which no one was obliged to foreſee or expect; theſe kinds of ſtipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rear-fief; for it would have been abſurd that a perſon who had only the uſufruit of a thing ſhould diſpoſe of the property of it. But as ſoon as they became perpetual, this was * permitted with ſome reſtrictions made by the cuſtoms†, which was what they called diſmembering their fief.

The perpetuity of the fiefs having eſtabliſhed the right of redemption, the daughters were rendered capable of ſucceeding to a fief, in default of male iſſue. For when the lord gave the fief to his daughter, he multiplied the caſes of his right of redemption, becauſe the husband was obliged to pay it as well as the wife ‖. This regulation could not take place in regard to the crown, for as it was not held of any one, there could be no right of redemption over it.

The daughter of William V. count of Toulouſe, did not ſucceed to the country. Afterwards, Eleonora ſucceeded to Aquitaine, and Mathildis to Normandy; and the right of the ſucceſſion of females ſeemed ſo well eſtabliſhed in thoſe days, that Lewis the Young, after his divorce from Eleonora, made

* But they could not abridge the fief, that is, aboliſh a portion of it.

† They fixed the portion which they could diſmember.

‖ This was the reaſon that the lords obliged the widow to marry again.

made no difficulty in reſtoring Guyenne to her. But as theſe two laſt inſtances followed cloſe to the firſt, the general law by which the women were called to the ſucceſſion of fiefs, muſt have been introduced much later * into the county of Toulouſe, than into the other provinces of the kingdom.

The conſtitution of ſeveral kingdoms of Europe has followed the actual ſituation, in which the fiefs were when thoſe kingdoms were founded. The women ſucceeded neither to the crown of France nor to the empire, becauſe at the eſtabliſhment of thoſe two monarchies, they were incapable of ſucceeding to fiefs. But they ſucceeded in kingdoms, whoſe eſtabliſhment was poſterior to that of the perpetuity of the fiefs, ſuch as thoſe founded by the conqueſts of the Normans, thoſe by the conqueſts made on the Moors; and others, in fine, which beyond the limits of Germany, and in later times, received in ſome meaſure a ſecond birth by the eſtabliſhment of Chriſtianity.

When the fiefs were at will, they were given to ſuch people as were capable of doing ſervice for them, wherefore they were never beſtowed on minors; but † when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increaſe their own profits, or to bring up the pupil in the military exerciſe. This is what our cuſtoms call the guardianſhip of a nobleman's children, which is founded on principles different from thoſe of tutelage, and is entirely a diſtinct thing from it.

* Moſt of the great families had their particular laws of ſucceſſion. See what M. de la Thaumaſſiere ſays, concerning the families of Berry.

† We ſee in the capitulary of the year 877, *apud Cariſiacum* art. 3. Baluzius's edition. tom. ii. pag. 269. the moment in which the kings cauſed the fiefs to be adminiſtered in order to preſerve them for the minors, an example followed by the lords, and which gave riſe to what we have mentioned by the name of the guardianſhip of a nobleman's children.

Book XXXI Chap. 32.

When the fiefs were for life, people vowed fealty for a fief, and the real delivery which was made by a ſcepter ſecured the fief, as it is now ſecured by homage. We do not find that the counts, or even the king's commiſſaries, received the homages in the provinces; nor is this function to be met with in the commiſſions of thoſe officers, which have been handed down to us in the capitularies. They ſometimes indeed made all the king's ſubjects take an oath of allegiance *; but this oath was ſo far from being an homage of the ſame nature as thoſe afterwards eſtabliſhed, that in the latter the oath of allegiance was an † action joined to homage, which ſometimes followed and ſometime preceded it, which did not take place in all homages, and which was leſs ſolemn than homage, and was quite a diſtinct thing from it.

The counts and the king's commiſſaries made thoſe vaſſals (a) whoſe fidelity was ſuſpected, give occaſionally a ſecurity which was called *firmitas*; but this ſecurity could not be an homage, ſince the kings (b) gave it to one another.

(a) Capitularies of Charles the Bald, in the year 860. *poſt redditum a confluentibus*, art. 3. Baluzius's edition, pag. 145.

And if the abbot *Segur* (c) makes mention of a chair of Dagobert, in which, according to the teſtimony of antiquity, the kings of France were accuſtomed to receive the homage of the nobility; 'tis plain that he employs here the notions and language of his own time.

When

(b) Ibid. art. 3.

(c) Lib. de adminiſtratione ſuâ.

* We find the formula thereof in the ſecond capitulary of the year 802. See alſo that of the year 854. art. 13. and others.

† M. du Cange in the word *hominium*, pag. 1163. and in the word *fidelitas*, pag. 474. cites the charters of the ancient homages where theſe differences are found, and a great number of authorities which may be ſeen. In paying homage, the vaſſal put his hand into that of his lord, and took his oath; the oath of fealty was made by ſwearing on the goſpels. The homage was performed kneeling, the oath of fealty ſtanding. None but the lord could receive homage, but his officers might take the oath of fealty. See Littleton, ſect. 91. & 92. of homage, that is, fidelity and homage,

When the fiefs deſcended to the heirs, the acknowledgment of the vaſſal, which at firſt was only an occaſional thing, became a regular action. It was made in a more ſolemn manner, and was attended with more formalities, becauſe it was to be a monument of the reciprocal duties of the lord and vaſſal through all ſucceeding ages.

I ſhould be apt to think, that the homages began to be eſtabliſhed under king Pepin, which is the time I mentioned that ſeveral benefices were given in perpetuity; but I ſhould not think thus without precaution, and only upon a ſuppoſition that the authors of the ancient annals (a) of the Franks were not ignorant pretenders, who in deſcribing the act of fealty performed by Taſſillon duke of Bavaria to king Pepin, ſpoke * according to the uſages of their own time.

(a) Anno 757. chap. 17.

CHAP. XXXIII.

The ſame ſubject continued.

WHEN the fiefs were either precarious or for life, they ſeldom had a relation to any other than the political laws; for which reaſon in the civil laws of thoſe times there is very little mention made of the laws of fiefs. But when they were become hereditary, when there was a power of giving, ſelling, and bequeathing them, they had then a relation both to the political and civil laws. The fief conſidered as an obligation to the military ſervice, depended on the political law; conſidered as a kind of commercial property, it depended on the civil law. This gave riſe to the civil laws concerning fiefs.

* *Taſſilo venit in vaſſatico ſe commendans, per manus ſacramenta juravit multa & innumerabilia, reliquiis ſanctorum manus imponens, & fidelitatem promiſit regi Pippino.* One would think that there was here an homage and an oath of fealty. See the penultimate note above.

BOOK XXXI. Chap. 33.

When the fiefs were become hereditary, laws relating to the order of ſucceſſions muſt have been relative to the law of the perpetuity of fiefs. Thus this rule of the French law, *eſtates of inheritance do not aſcend* (a), was eſtabliſhed in ſpite of the Roman and Salic (b) laws. It was neceſſary that the fief ſhould be ſerved; but a grandfather or a great uncle would have been very bad vaſſals to give to the lord: wherefore this rule took place at firſt only in regard to the fiefs, as we learn of Boutillier (c).

(a) Book iv. *de feudis*, tit. 59.

(b) In the tit. of *allodia*.

(c) *Somme Rurale*, book i. tit. 76. pag. 447.

When the fiefs were become hereditary, the lords who were to ſee that the fief was ſerved, inſiſted that the * daughters who were to ſucceed to the fief, and I fancy ſometimes the males, ſhould not marry without their conſent; inſomuch that the marriage-contracts became in reſpect to the lords both a feudal and a civil regulation. In an act of this kind under the lord's inſpection, regulations were made for the future ſucceſſion, with a view that the fief might be ſerved by the heirs: hence none but the nobility at firſt had the liberty of diſpoſing of the future ſucceſſions by marriage-contract, as (d) Boyer and (e) Aufrerius have juſtly obſerved.

(d) Deciſion 155. No. 8. & 204. & No. 38.

(e) In Capell. Thol. deciſion 453.

It is needleſs to mention that the power of redemption founded on the old right of the relations, a myſtery of our ancient French juriſprudence which I have not now time to lay open, could not take place with regard to the fiefs till they were become hereditary.

Italiam, Italiam . . . . . .

I finiſh my treatiſe of fiefs at a period, where moſt authors commence theirs.

* According to an ordinance of St. Lewis, in the year 1246. to ſettle the cuſtoms of Anjou and Maine; thoſe who ſhall have the care of the heireſs of a fief, ſhall give ſecurity to the lord that ſhe ſhall not be married without his conſent.

FINIS.

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FINIS.